No. 99-6218-CSY Title: Wilbert K. Rogers, Petitioner
v.
Tennessee

Docketed: September 17, 1999 Court: Supreme Court of Tennessee, Western Division

Entry	Date	Proceedings and Orders
	Sep 16 1999	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due December 17, 1999)
	Oct 12 1999	Waiver of right of respondent Tennessee to respond filed.
	Oct 21 1999	DISTRIBUTED for Conference of November 5, 1999
	Oct 27 1999	Response requested. (Due November 27, 1999)
	Nov 29 1999	Order extending time to file response to petition until December 17, 1999.
	Dec 20 1999	Brief of respondent Tennessee in opposition filed.
	Dec 30 1999	REDISTRIBUTED for Conference of January 14, 2000
	Jan 18 2000	REDISTRIBUTED for Conference of January 21, 2000
	May 8 2000	REDISTRIBUTED for Conference of May 11, 2000
	May 15 2000	REDISTRIBUTED for Conference of May 18, 2000
	May 22 2000	Petition GRANTED. SET FOR ARGUMENT November 1, 2000. **********
	Jun 16 2000	Joint appendix filed.
	Jun 30 2000	Brief of petitioner Wilbert K. Rogers filed.
	Aug 7 2000	Brief of respondent Tennessee filed.
	Aug 7 2000	Brief amicus curiae of Tennessee Association of Criminal Defense Attorneys filed.
	Aug 30 2000	Record filed.
	Sep 5 2000	Reply brief of petitioner Wilbert K. Rogers filed.
	Sep 15 2000	CIRCULATED.
	Nov 1 2000	ARGUED.

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

NO. _____

WILBERT K ROGERS,

Petitioner,

VS.

STATE OF TENNESSEE,

Respondent.

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AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, WILBERT K. ROGERS, being first duly sworn, depose and say that I am the petitioner in the above-styled case; that in support of my Motion to proceed on a Petition for Writ of Certiorari without being required to prepay fees, cost or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor, and that I believe I am entitled to redress.

I further swear that the responses which I have made below relating to my ability to pay the cost of my prosecuting the Petition for Writ of Certiorari are true.

1. I am presently unemployed and incarcerated in the Tennessee Penitentiary system at Henning, Tennessee.

2. I have received no income within the past twelve months from a business, profession or other form of self-employment or from rent payments, interest dividends, or from any other source.

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SUPREME COURT, U.S.

21PP

3. I own no cash or checking or savings account.

4. I own no real estate, stocks, bonds, notes, automobiles or other valuable property.

5. I have 0 dependents.

I understand that a false statement in this Affidavit will subject me to penalties for perjury.

Wilbert K. Rogers Wilbert K. Rogers

SWORN TO AND SUBSCRIBED BEFORE me this 23 day of July, 1999.

Elsie Ann Cooper
Notary Public

My Commission Expires:

June 16, 2003

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

WILBERT K. ROGERS,

Petitioner,

VS.

STATE OF TENNESSEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

ATTORNEY FOR PETITIONER:

W. Mark Ward
Assistant Shelby County Public Defender
Suite 2-01, 201 Poplar Ave.
Memphis, TN 38103
Telephone: (901) 545-5837

99-6218

QUESTION PRESENTED FOR REVIEW

ROGERS v. TENNESSEE

Whether the ex post facto application of a judicial ruling abrogating the substantive rule of criminal law known as the "year-and-a-day rule" to a homicide committed five years prior to the change in the substantive rule of law violates the Fifth and Fourteenth Amendments of the U. S. Constitution?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

WILBERT K. ROGERS,

Petitioner,

VS.

STATE OF TENNESSEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

INTRODUCTION

The petitioner, Wilbert K. Rogers, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Tennessee, affirming his conviction for second degree murder and sentence of 33 years imprisonment.

OPINION BELOW

The opinion of the Supreme Court of Tennessee is reported *State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999).

JURISDICTION

The opinion of the Supreme Court of Tennessee was entered on May 24, 1999. The Supreme Court of Tennessee denied a Petition to Rehear on June 21, 1999. Petitioner invokes the jurisdiction of this Court under the authority of 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner submits that this case involves application of the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

A. Procedural History

In September 1995, the Petitioner, Wilbert K. Rogers, was indicted by the Shelby County (Memphis, Tennessee) Grand Jury for Murder in the First Degree, allegedly committed against James Bowdery on May 7, 1994. (I, 1-13). Mr. Bowdery died on August 29, 1995, more than a year-and-a-day after the assault. (II, 138-139, 142). The Shelby County Public Defender was appointed to represent the Petitioner and on January 31, 1996, a petit jury found the Petitioner guilty of second degree murder. He was sentenced to 33 years imprisonment. (I, 34).

On appeal to the Tennessee Court of Criminal Appeals, Petitioner raised the issue that he could not be convicted of murder because of the common law year-and-a-day rule which had been declared to be the law in Tennessee by both the Tennessee Supreme

Court[1] and the Tennessee Court of Criminal Appeals.[2] On October 17, 1997, the Tennessee Court of Criminal Appeals rejected the Petitioner's appeal and found that the year-and-a-day rule had been abolished by its failure to include it in Tennessee's codification of its criminal laws in 1989. As authority, the Court of Criminal Appeals cited another opinion[3] of the Court of Criminal Appeals which *significantly* had been decided after the Petitioner's assault of the victim in the present case.

The Tennessee Supreme Court granted Mr. Rogers' Application for Permission to Appeal and on May 24, 1999 issued its opinion in *State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999). The Tennessee Supreme Court concluded that the year-and-a-day rule had *not* been abolished by the 1989 Tennessee Criminal Code and that it was in full force and affect in Tennessee at the time that the Petitioner assaulted the victim in the present case. The Tennessee Supreme Court further found that the common law year-and-a-day rule was no longer justified and it abrogated the rule.

The Tennessee Supreme Court further concluded that its judicial abrogation of the rule in 1999 could be applied to the assault in the present case which occurred in 1994 without violating the Fifth and Fourteenth Amendments of the United States Constitution because the retroactive application was not unexpected. See *State v. Rogers*, 992 S.W.2d

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[1]Percer v. State, 118 Tenn. 765, 777, 103 S.W. 780, 782 (1907).

[2]Cole v. State, 512 S.W.2d 598, 601 (Tenn. Crim. App. 1974).

[3]State v. Ruane, 912 S.W.2d 766 (Tenn. Crim. App. 1995). This case was decided after Mr. Rogers assaulted the victim in the present case and could in no way provide any type of notice to Petitioner that the year-and-a-day rule in Tennessee may have been abolished.

393, 402 (Tenn. 1999).

On June 21, 1999, the Tennessee Supreme Court denied a Petition to Rehear.

B. Statement of Facts

This case involves purely a question of law. There was no factual dispute as to the fact that the victim died more than a year-and-day after the assault.

REASONS FOR GRANTING THE PETITION

The Tennessee Supreme Court's opinion cites two United States Supreme Court opinions for the rule of law that the Fifth and Fourteenth Amendments only prohibit retroactive application of judicial constructions of a criminal statute that are "unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue." *State v. Rogers*, 992 S.W.2d 402 (Tenn. 1999). The two cases relied upon are *Bouie v. City of Columbia*, 378 U.S. 347, 354, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) and *Marks v. United States*, 430 U.S. 188, 191-192, 97 S.Ct. 990, 992-93, 51 L.Ed.2d 260 (1977). The Tennessee Supreme Court then concludes that "[g]iven the fact that the rule has been abolished by every court [referring to other states] which has squarely faced the issue, and given the fact that the validity of the rule has been questioned in this State in light of the passage of the 1989 Act, we conclude that our decision abrogating the rule is not an unexpected and unforeseen judicial construction of a principle of criminal law." *State v. Rogers*, at 402.

Petitioner respectfully submits that the Tennessee Supreme Court overlooked or misapprehended the import of both *Bouie* and *Marks* by finding that it could look to the law of other jurisdictions to determine whether its abrogation of the year-and-a-day rule was "unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue."

In *Bouie v. City of Columbia* the defendants' trespass convictions were affirmed by the South Carolina Supreme Court based on the retroactive application of an interpretation of a trespass statute to include the act of *remaining* on premises after receiving notice to

leave. The specific statute in question made it a criminal offense to *enter* upon the premises of another after having received notice from the owner prohibiting the entry. Quoting from Hall, General Principles of Criminal Law (2d ed 1960, at 61, the United States Supreme Court stated that "i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." *Bouie* at 378 U.S. 354. In determining whether the state court's construction of the criminal statute was so unforeseeable as to deprive the defendant of fair warning, the United States Supreme Court focused primarily upon two areas of inquiry. First, if the result of the judicial interpretation (abrogation of the year-and-a-day rule) had been accomplished by an amendment to the statute by the legislature, would the retroactive application of the amendment violate the constitution. In *Bouie* the U. S. Supreme Court concluded that had the change in the law been accomplished by the legislature, clearly there would have been an ex post facto violation in applying the change retroactively. *Bouie* at 378 U.S. 354-355. Similarly, had the Tennessee legislature at its 1999 session amended the 1989 Criminal Code to do away with the year-and-a-day rule, the amendment could not have been retroactively applied to offenses committed before the effective date of the amendment. The second primary area of inquiry by the U.S. Supreme Court was the prior decisional law of South Carolina. Looking at prior South Carolina decisional law, the U.S. Supreme Court concluded that the new interpretation of the statute to include remaining on premises "has not the slightest support in prior South Carolina decisions." *Bouie* at 378 U.S. 356. Accordingly, the U.S. Supreme Court concluded that the pre-existing South Carolina law gave the defendants

no warning of the judicial construction of the statute.

With regard to whether the law of other states could be consulted the United States Supreme Court said "[i]t would be a rare situation in which the meaning of a statute of another State sufficed to afford a person 'fair warning' that his own State's statute meant something quite different from what its words said." *Bouie* at 378 U.S. 359-360. However, the United States Supreme Court did go on and conclude that "if the law of other States is indeed to be consulted" that law also does not support the judicial construction applied by South Carolina. *Bouie* at 378 U.S. 360.

In *Marks v. United States* the defendants were convicted in federal court of transporting obscene materials based on retroactive application of the definition of obscenity announced in *Miller v. California*, 413 U.S. 15 (1973). The United States Supreme Court reversed the convictions holding that the due process clause forbid the retroactive application of the *Miller* standards. *Marks v. United States* has no similarities to the present case other than to restate the general rule of *Bouie*.

Petitioner can find no United States Supreme Court opinion that has applied the *Bouie* test and found the retroactive application of a new judicial construction to be constitutional. Furthermore, the *Bouie* test focuses on the prior judicial decisions of the state of defendant's offense, not other states. Petitioner respectfully submits that there is no duty placed upon the citizens of Tennessee to know the laws of all fifty states in the union. Likewise, changes in the laws of other states cannot be the foundation for giving Tennessee citizens "fair warning" as to the substance of Tennessee law.

Focusing on the prior decisional law in Tennessee, the year-and-a-day rule was

clearly recognized as the law in Tennessee in *Percer v. State*, 118 Tenn. 765, 103 S.W. 780 (1907) and *Cole v. State*, 512 S.W.2d 598 (Tenn. Crim. App. 1974). At the time Petitioner committed his actions in the present case, no Tennessee decisional law had ever called the year-and-a-day rule in question. As such, based on Tennessee law as it "had been expressed prior to the conduct in issue" there is not the slightest support for abrogation of the year-and-a-day rule and no "fair warning" to the Petitioner. Contrary to the Tennessee Supreme Court's conclusion the validity of the year-and-a-day rule in Tennessee was never questioned until after Petitioner's acts in the present case.

The Tennessee Supreme Court also cited authorities from three other states as supporting the decision to apply the abrogation of the year-and-a-day rule retroactively. *People v. Snipe*, 192 Cal. Rptr. 6 (Ca. Ct. App. 1972); *Commonwealth v. Ladd*, 166 A.2d 501 (Pa. 1960), and *State v. Sandridge*, 365 N.E.2d 898 (Ohio Ct. C.P. 1977). Petitioner respectfully submits that these three authorities pale in comparison to those which have found such retroactive application to violate ex post facto concerns. The Tennessee Supreme Court cited six state supreme court opinions and a federal court opinion finding a violation of ex post facto rules. See *State v. Rogers*, 992 S.W.2d 393, 402 (Tenn. 1999). In addition to those seven authorities, *State v. Cross*, 260 Ga. 845, 401 S.E.2d 510 (1991); and *State v. Edwards*, 104 Wash.2d 63, 701 P.2d 508 (1985)(statute creating three-years-and-a-day rule cannot be applied retroactively) also support the ex post facto contentions of the Petitioner. Furthermore, Petitioner relies not only upon the sheer number of authorities in support of his contention but also on the fact that the three authorities relied upon by the Tennessee Supreme Court may be distinguished from the present case.

Snipe and *Ladd* both involve jurisdictions where the year-and-a-day rule was considered nothing more than a rule of evidence, not a substantive rule of law. The State concedes in the present case that the rule in Tennessee concerned a substantive rule of law. In addition, in *Snipe* the legislature changed the year-and-a-day rule before the year had expired. The Court placed great weight on the fact that the change in the law had occurred before the right to the rule had vested. Finally, *Sandridge* is nothing more than a trial court opinion in which ex post facto was never considered or mentioned in any fashion.

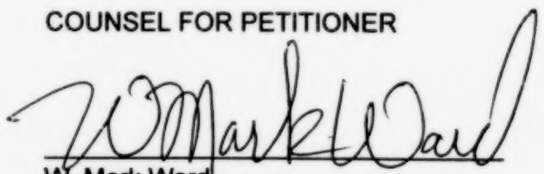
Based on the foregoing authorities, it is clear that there is a conflict among the states as to whether the abrogation of the year-and-a-day rule may be applied retroactively. In addition to resolving this conflict, the present Petition raises important questions of law. The exception allowing retroactivity that was created in *Bouie v. City of Columbia* has never been applied to allow retroactive application of a new judicial construction. In addition, the question of whether the rule allows the law of other states to provide notice to a defendant has never been addressed by the United States Supreme court, but only alluded to in *Bouie*. Finally, this Honorable Court has granted a Writ of Certiorari in *Carmell v. State*, 963 S.W.2d 833 (Tex. App. - Fort Worth 1998) to resolve the retroactivity of a procedural statute. The present case involves the retroactivity of a judicial construction of a substantive rule of law. Application of the new substantive rule of law to an offense committed five years earlier is more egregious than the application of the new procedural rule in *Carmell*.

CONCLUSION

Petitioner respectfully asks this most Honorable Supreme Court of the United States to grant his Petition for Writ of Certiorari to the Supreme Court of Tennessee. Questions of constitutional law are presented in this Petition which are of paramount interest and importance.

Respectfully submitted,

COUNSEL FOR PETITIONER



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Telephone: (901) 545-5837

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

NO. _____

WILBERT K. ROGERS,
Petitioner,

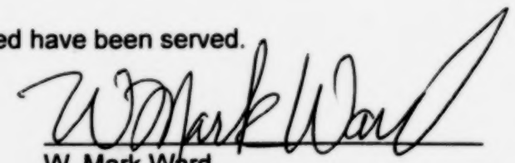
VS.

STATE OF TENNESSEE,
Respondent.

CERTIFICATE OF SERVICE

I, W. Mark Ward, a member of the Bar of the Supreme Court of the United States and counsel of record for Wilbert K. Rogers, petitioner herein, hereby certifies that on the 3rd day of August, 1999, I served a copy of the foregoing Petition for Writ of Certiorari in the above entitled case on the Attorney General of Tennessee, by depositing the same in the United States Post Office, Memphis, Tennessee, with first-class postage prepaid, properly addressed to said respondent's counsel at the Criminal Justice Division, Cordell Hull Building, 2nd Floor, 425 5th Avenue North, Nashville, Tennessee 37243-0493, his post office address.

All parties required to be served have been served.



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Memphis, TN 38103
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SF 1166a OCR
4 TFRM 2000
(Rev. 5-84)
1166-226

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VOUCHER AND SCHEDULE OF PAYMENTS

NN 479,338

DEPARTMENT OR ESTABLISHMENT: Supreme Court of the U. S.
BUREAU OR OFFICE: Clerk's Office
LOCATION OF TRANSMITTING OFFICE: Washington, D.C.

D O VOU NO (TRANSP)

PURSUANT TO AUTHORITY VESTED IN ME, I CERTIFY THAT THE ITEMS LISTED HEREIN ARE CORRECT AND PROPER FOR PAYMENT FROM THE APPROPRIATION (S) DESIGNATED HEREON OR ON SUPPORTING VOUCHERS

PAID BY

8/30/00
DATE

Dee Shore
AUTHORIZED CERTIFYING OFFICER

APPROPRIATION SUMMARY

NAP

ALIGN AREA

ALIGN AREA					
FONT	SHEET	OF	AGENCY STATION NO	SCHEDULE NUMBER	FOR D O USE ONLY
1	1	1	5698		

GRAND TOTAL	NO-CHECK TOTAL
$4,921.55	

MEMORANDUM

PAYEE AND IF NECESSARY, ADDRESS (LINES 1, 3, 5, AND 7)	INVOICE NUMBER (LINES 2, 4, 6 AND 8)		AMOUNT	NO CHECK	VOUCHER NO
Wilson Epes Printing Co. 707 Sixth Street, N.W. Washington, D.C. 20001	99-6218	(14638)	$ 963.00		C-52
Cockle Printing Co. 2311 Douglas Street Omaha, NE 68102	99-6218	(20724)			
	99-7504	(20687)	$ 3,958.55		C-53
	99-7504	(20686)			

SF 1166a OCR
4 TFRM 2000
(Rev. 5-84)
1166-226

H

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BUREAU OR OFFICE: Clerk's Office
LOCATION OF TRANSMITTING OFFICE: Washington, D.C.

D O VOU NO (TRANSP)

PURSUANT TO AUTHORITY VESTED IN ME, I CERTIFY THAT THE ITEMS LISTED HEREIN ARE CORRECT AND PROPER FOR PAYMENT FROM THE APPROPRIATION (S) DESIGNATED HEREON OR ON SUPPORTING VOUCHERS

PAID BY

8/30/00
DATE

Dee Shore
AUTHORIZED CERTIFYING OFFICER

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	99-7504	(20687)	$ 3,958.55		C-53
	99-7504	(20686)			

BEST AVAILABLE COPY

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543-0001

August 7, 2000

Paul G. Summers, Esq.
425 Fifth Ave., North
Nashville, TN 37243

Re: 99-6218 - Rogers v. Tennessee

Dear Mr. Summers:

The above stated case is scheduled for oral argument on **Wednesday, November 1, 2000**. Arguing counsel must be present on that day.

Arguing counsel must report to the Lawyer's Lounge on the first floor between 9:00 and 9:15 a.m. on the day assigned for argument. The Clerk will brief counsel scheduled to argue. Identification cards will be issued to those attorneys authorized to occupy seats at argument tables.

A copy of the argument schedule for the Session Beginning October 30, 2000 is enclosed. Please read carefully the instructions to counsel printed on the reverse side of the calendar.

Also, enclosed is an Argument Form. Please complete this form and return it to me no later than **Monday, September 11, 2000.** If you have any questions, please do not hesitate to get in touch with me.

Sincerely,

Denise J. McNerney
Merits Cases Clerk
(202) 479-3032

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

August 7, 2000

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

Clerk
Supreme Court of Tennessee,
Western Division
100 Supreme Court Building
Nashville, TN 37219-0606

Re: 99-6218 - Rogers v. Tennessee
(Your Docket No. 02S019804CR00035)

Dear Clerk:

Pursuant to Rule 12.7 of the Rules of the Supreme Court of the United States, you are requested to certify and transmit immediately the entire record in the above case to this office. Please include in this transmittal all exhibits, lodgings, and briefs that have been filed.

Please be certain to include a transmittal letter referencing this Court's docket number. It is critical that you note if the record, or any portion of the record, has been sealed or contains confidential information. If this type of information is contained in the record, these documents must be enclosed in a separate envelope or box and marked accordingly.

If your court is not in possession of the lower court record, please forward a copy of this letter and a request for the lower court to transmit its record directly to this office.

If you have any questions please contact me. Your prompt attention to this matter will be greatly appreciated.

Kindly acknowledge receipt of this letter.

Sincerely,

WILLIAM K. SUTER, CLERK

Denise J. McNerney
Merits Cases Clerk
(202) 479-3032

cc: Mark Ward, Esq.
Paul G. Summers, Esq.

ORIGINAL

Supreme Court, U.S.
FILED
DEC 20 1999
CLERK

No. 99-6218

IN THE
SUPREME COURT OF THE UNITED STATES

WILBERT K. ROGERS,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION

RECEIVED
DEC 22 1999
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SUPREME COURT, U.S.

PAUL G. SUMMERS
Attorney General & Reporter
State of Tennessee

MICHAEL E. MOORE
Solicitor General
Counsel of Record
Office of the Attorney General
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 741-3226

COUNSEL FOR RESPONDENT

12 pp

QUESTION PRESENTED FOR REVIEW

Whether the Tennessee Supreme Court's retroactive application of its decision abolishing the common law "year-and-a-day rule" violated petitioner's due process rights under the Fifth and Fourteenth Amendments of the United States Constitution?

OPINION BELOW

The opinion of the Tennessee Supreme Court is published at 992 S.W. 2d 393 (Tenn. 1999). The order denying rehearing (Apx. 1) is unpublished.

STATEMENT OF JURISDICTION

The opinion of the Tennessee Supreme Court was filed on May 24, 1999. The Tennessee Supreme Court denied a petition to rehear on June 21, 1999. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

In January, 1996, petitioner was convicted of second-degree murder and sentenced to 33 years. (I. 34) The Tennessee Court of Criminal Appeals affirmed the conviction. *State v. Wilbert K. Rogers (A.K.A. Person Rogers)*, No. 02C01-9611-CR-00418, 1997 WL 642309 (Tenn. Crim. App., filed October 17, 1997, at Jackson). On April 13, 1998, the Tennessee Supreme Court granted petitioner's Application for Permission to Appeal. In an opinion dated May 24, 1999, the Tennessee Supreme Court abolished the year-and-a-day rule and applied its decision retrospectively to petitioner's case.

STATEMENT OF THE FACTS

In May 1994, the defendant stabbed James Bowdery in the chest. Bowdery staggered to the apartment of Dianna Reed, reported the stabbing, and lay down on the couch. Reed called an ambulance.

Following the stabbing, Bowdery went into cardiac arrest. Before his heart

could be restarted and circulation reestablished, the defendant developed hypoxia of the brain. Bowdery survived in a vegetative state until August 1995, when he died of a kidney infection, a complication of the coma.

ARGUMENT

THE TENNESSEE SUPREME COURT PROPERLY CONCLUDED THAT THE RETROSPECTIVE APPLICATION OF THE ABOLISHMENT OF THE YEAR-AND-A-DAY RULE DID NOT VIOLATE PETITIONER'S DUE PROCESS RIGHTS.

Petitioner argues that the Tennessee Supreme Court's retrospective application of its decision abolishing the common law year-and-a-day rule violated his due process rights under the Fifth and Fourteenth Amendments. To the contrary, the Supreme Court's abrogation of the year-and-a-day rule was not an unforeseeable judicial enlargement of a criminal statute; therefore, the retrospective application of the decision was proper.

The Ex Post Facto Clause of the United States Constitution is a limitation upon the powers of the legislature, *see Calder v. Bull*, 3 Dall. 386 (1798), and does not apply to the judicial branch. *Frank v. Magnum*, 237 U.S. 309, 344 (1915). However, this Court has held that the Fifth and Fourteenth Amendments forbid retroactive application of an unforeseeable judicial modification of criminal law to the disadvantage of the defendant. *Marks v. United States*, 430 U.S. 188, 191-92 (1977); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Rose v. Locke*, 423 U.S. 48 (1975)

In *Bouie*, the defendants were convicted of trespassing after refusing to leave

a restaurant when an employee of the store posted a "no trespassing" sign. *Bouie, supra* at 348. The statute under which the defendants were charged defined trespass as "entry upon the lands of another ... after notice from the owner ... prohibiting such entry." *Id* at 351-352. The South Carolina Supreme Court, in affirming the defendants' convictions, interpreted the statute to proscribe remaining on the premises after being told to leave, as well as entering the premises after being notified not to enter. *Id* at 350. In this Court the defendant's argued that they were denied due process of law because the interpretation of the statute under which they were convicted punished them for conduct that was not criminal at the time they committed it, thereby depriving them of fair warning of the conduct the statute prohibited. *Id* at 350. This Court reversed the defendants' convictions, finding that they had indeed been denied due process of law by the South Carolina Supreme Court's interpretation of the statute. The Court found that the defendants "were given no warning whatever" that the conduct in which they had engaged violated the statute. *Id* at 355, 362. The Court opined that it was "a basic principle that a criminal statute must give fair warning of the conduct that it makes a crime" and that "a deprivation of fair warning can result not only from vague statutory language but also from an unforeseeable judicial expansion of narrow and precise statutory language." *Id* at 352.

In *Marks* the defendants were charged with transporting obscene materials in interstate commerce. *Marks, supra* at 189. Between the time that the defendants were

charged with the offense and the trial, this Court decided *Miller v. California*, 413 U.S. 15 (1973), which announced new standards for interpreting obscenity laws. The defendants argued in the district court that they were entitled to jury instructions under the more favorable definition of obscenity that existed prior to this Court's opinion in *Miller*. *Id* at 190. The district court overruled the defendants' objection and instructed the jury under the *Miller* standard. *Id* at 191. This Court held that the test announced in *Miller* could not be applied to the defendants because their acts were committed before the Court had announced the *Miller* test and those standards "imposed criminal liability for conduct not punishable [previously]." *Id* at 196.

In this case, the Tennessee Supreme Court properly determined that their decision to abolish the year-and-a-day rule could be applied retroactively because it was not a "judicial construction of a criminal statute [that] is unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue". *State v. Rogers*, 992 S.W.2d 393, 402 (citing *Bouie, supra*, at *354)* The court noted that the year-and-a-day rule had never been a ground of any decision in Tennessee and had only been mentioned once by the state appellate courts since 1907. *Id.* It also cited the fact that the rule had been abolished judicially or legislatively in many other jurisdictions, and had been called into question by the adoption of the 1989 Criminal Code, which in defining homicide did not include a reference to the year-and-a-day rule. *Id*.

An objective of the 1989 Criminal Code was to "give fair warning of what

conduct is prohibited, and guide the exercise of official discretion in law enforcement, by defining the act and culpable mental state which together constitute the offense." Tenn. Code Ann. § 39-11-101(2). It provided that "conduct does not constitute an offense unless it is defined as an offense by statute, municipal ordinance, or rule authorized by and lawfully adopted under a statute." Tenn. Code Ann. § 39-11-102. The Sentencing Commission Comments specifically state that "it is the intent of the commission that common law offenses be replaced with statutory offenses to effect the goals set forth in § 39-11-101(1) and (2)."

The 1989 Criminal Code defines criminal homicide as: "the unlawful killing of another person which may be first degree murder, second degree murder, voluntary manslaughter criminally negligent homicide, or vehicular homicide." Tenn. Code Ann. § 39-13-201. The year-and-a-day rule is not mentioned.

Additionally, the retroactive application of the abrogation of the year-and-a-day rule does not implicate the same notice concerns that this Court enunciated in *Bouie* and its progeny. Clearly, in this case, the defendant was aware that his conduct, *i.e.* killing another human being, was proscribed by the statute. Accordingly, this case is not controlled by *Bouie* or *Marks*, where the defendants were not on notice that the conduct in which they were engaged was proscribed by the criminal law and where the courts in question had expanded narrow and precise criminal laws to include the conduct of the defendants.

The defendant was not deprived of fair warning that the conduct in which he was engaged was criminal, therefore, he was not deprived of his due process rights when the Tennessee Supreme Court retroactively applied its decision to abolish the year-and-a-day rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General & Reporter
State of Tennessee

Michael E. Moore

MICHAEL E. MOORE
Solicitor General
Counsel of Record
Office of the Attorney General
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 741-3226

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been furnished to all parties required to be served in this cause by delivering a true and exact copy to the office of counsel of record shown at the address below by placing a copy in the U.S. mail, first-class, postage prepaid, on the 21st day of December, 1999.

W. Mark Ward
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Memphis, Tennessee 38103
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Michael E. Moore

MICHAEL E. MOORE
Solicitor General
Counsel of Record

APPENDIX NO. 1

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE,	)	**NOT FOR PUBLICATION**
	)	
Appellee,	)	SHELBY CRIMINAL
	)	
v.	)	NO. 02S01-9804-CR-00035
	)	
WILBERT K. ROGERS,	)	
	)	
Appellant.	)	

ORDER

The appellant has filed a petition for rehearing in this appeal pursuant to Tenn. R. App. P. 39. We have considered all of the arguments raised in the petition, and we have found them to be without merit. It is, therefore, ORDERED that the petition is denied.

PER CURIAM

STATE OF TENNESSEE

Office of the Attorney General

PAUL G. SUMMERS
ATTORNEY GENERAL AND REPORTER

ANDY D. BENNETT
CHIEF DEPUTY ATTORNEY GENERAL

LUCY HONEY HAYNES
ASSOCIATE CHIEF DEPUTY
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SOLICITOR GENERAL

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NASHVILLE, TN 37243-0485

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December 21, 1999

Honorable William K. Suter
Clerk of the Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

RE: *Wilbert K. Rogers v. Tennessee*, No. 99-6218

Dear Mr. Suter:

On December 17, 1999, the State filed it brief in opposition to the Petition for Writ of Certiorari in *Wilbert K. Rogers v. State of Tennessee.* It came to my attention today that, following my final review of the brief, the citation in *Bouie v. City of Columbia,* 378 U.S. 347 (1964) was erroneously altered throughout the brief. I have made the appropriate changes and respectfully request that you substitute the enclosed briefs for those previously submitted.

Sincerely,

Michael E. Moore

MICHAEL E. MOORE
Solicitor General
Counsel of Record
Office of the Attorney General
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 741-3226

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cc: W. Mark Ward

Supreme Court, U.S.
FILED
JUN 30 2000
CLERK

(4)

No. 99-6218

IN THE

Supreme Court of the United States

WILBERT K. ROGERS,

Petitioner,

VS.

STATE OF TENNESSSEE,

Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee

JOINT APPENDIX

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Counsel for Respondent

* Counsel of Record

PETITION FOR CERTIORARI FILED SEPTEMBER 16, 1999
CERTIORARI GRANTED MAY 22, 2000

33 pp

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
8/9/94	Shelby County (Tennessee) Grand Jury returns indictment charging Petitioner, Wilbert K. Rogers with *attempt* to commit the murder in the first degree of Ira J. Bowdery, allegedly committed on May 7, 1994.
9/12/95	Shelby County (Tennessee) Grand Jury returns indictment charging Petitioner, Wilbert K. Rogers, with first degree murder, allegedly committed against Ira J. Bowdery during the period of time between May 6, 1994 and August 31, 1995.
1/31/96	Petit jury returns verdict finding Petitioner guilty of *second* degree murder.
4/23/96	Trial judge enters judgment on jury verdict.
10/17/97	Opinion and Judgment of Tennessee Court of Criminal Appeals is filed.
5/24/99	Opinion and Judgment of Tennessee Supreme Court is filed.
6/21/99	Petition to Rehear denied by Tennessee Supreme Court.
9/16/99	Petition for Certiorari filed in United States Supreme Court.
5/22/00	Certiorari granted.

STATE OF TENNESSEE
CRIMINAL COURT OF SHELBY COUNTY
JULY TERM, 1994

Count 1

THE GRAND JURORS of the State of Tennessee, duly selected, empaneled, sworn and charged to inquire for the body of the county of Shelby, Tennessee, upon their oath, present that:

WILBERT K. ROGERS
(also known as PERSON ROGERS)

on May 7, 1994, in Shelby County, Tennessee, and before the finding of this indictment, did unlawfully attempt to commit the offense of First Degree Murder as defined in T.C.A. 39-13-202, in that he, the said Wilbert K. Rogers, also known as, Person Rogers did unlawfully, intentionally, deliberately and with premeditation attempt to kill IRA J. BOWDERY in violation of T.C.A. 39-12-101, against the peace and dignity of the State of Tennessee.

/s/ Illegible
District Attorney General
30th Judicial District

A.G.File # X0553

NO. 94-07084

Indictment for
Criminal Attempt

T.C.A. 39-12-101 Scats code-21001

STATE OF TENNESSEE

vs.

WILBERT K. ROGERS
(also known as PERSON ROGERS)

WITNESSES:

Summon for State

W.J. WARR, MPD, HOMICIDE
T.W. COOPER, MPD.
W. GOODEN, MPD.
S. HICKS, MPD.
IRA J. BOWDERY, 1647 BARTON
LISA SLEDGE, 375 VANCE #C
DIANNE REED, 391 VANCE #C
JIMMY REED, " "
O. W. STEWART, MPD

W.J. WARR
Prosecutor

A TRUE BILL

/s/ _____
Foreman of the Grand Jury

Date Indictment Returned: 8-9-94

STATE OF TENNESSEE
CRIMINAL COURT OF SHELBY COUNTY
JULY TERM, 1995

Count 1

THE GRAND JURORS of the State of Tennessee, duly selected, empaneled, sworn and charged to inquire for the body of the county of Shelby, Tennessee, upon their oath, present that:

WILBERT K. ROGERS
(also known as PERSON ROGERS)

during the period of time between May 6, 1994 and August 31, 1995, in Shelby County, Tennessee, and before the finding of this indictment, did unlawfully, intentionally, deliberately and with premeditation kill IRA J. BOWDERY, in violation of T.C.A. 39-13-202, against the peace and dignity of the State of Tennessee.

/s/ Illegible
District Attorney General
30th Judicial District

A.G. File # X0553

NO. 95-09161

Indictment for
Murder First Degree

T.C.A. 39-12-101 (Scats-21015)

STATE OF TENNESSEE

vs.

WILBERT K. ROGERS
(also known as PERSON ROGERS)

WITNESSES:

Summon for State

W.J. WARR, MPD, HOMICIDE
T.W. COOPER, W. GOLDEN, S. HICKS, MPD.
S. HICKS, MPD.
LISA SLEDGE, 375 VANCE #C
DIANNE REED, 391 VANCE #C
J.D. DEAN, M.W. NELSON, W. MCNABB, MPD.
J.T. FRANCISCO, C/O SHELBY, CO. MEDICAL EXAMINERS OFF.
JEANNETTE BOWDERY, 929 S. FOURTH ST. APT. L
J. L. NICHOLS, MPD

W.J. WARR
Prosecutor

A TRUE BILL

/s/ Illegible
Foreman of the Grand Jury

Date Indictment Returned: 9-12-95

IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE

Case Number 95-091161 Count #: _____
Judicial District 30th Judicial Division VIII

Attorney for the State A. Welch
Counsel for Defendant T. Brayton
☐ Retained: ☐ Appointed: ☒ Public Defender

State of Tennessee
vs.
Defendant Wilbert Rogers
Date of Birth 9/1/57 Sex M Race B
From Indictment # _____ Warrant # _____

Alias _____
SSN ___-UK-___
TDOC # _____

JUDGMENT

Comes the District Attorney General for the State and the defendant with counsel of record for entry of judgment.
On the ____ day of _____, 19____, the defendant:

☐ Pled guilty ☐ dismissal/nolle prosqui
☐ nolo contendere ☐ remand/transfer to other court
☐ retired/unapprehended defendant
Is found:
☒ guilty ☐ not guilty
☐ jury verdict ☐ not guilty by reason of insanity
☐ bench trial

Indictment: Class (circle one): (1st) A B C D E ☒ Felony ☐ Misdemeanor
Offense MURDER FIRST
Amended Charge _____
Offense date 5/7/94 County Shelby
Conviction offense MURDER SECOND
TCA # : _____ Sentence-imposed date 5-23-96
Conviction class (circle one): 1st (A) B C D E ☒ Felony ☐ Misdemeanor

After considering the evidence, the entire record, and all factors in T.C.A. Title 40, Chapter 35, all of which are incorporated by reference herein, the Court's findings and rulings are:

☐ Sentence Reform Act of 1989
☐ Mitigated 20% ☐ Mitigated 30%
☐ Standard 30% Range1 ☒ Multiple 35% Range 2
☐ Persistent 45% Range 3 ☐ Career 60%
☐ Violent 100%
☐ 1st Degree Murder ☐ Multiple Rapist
☐ Repeat Violent Offender ☐ Child Rapist
☐ School Zone

☐ Pre 1982 Sentence: _____
☐ 1st Degree Murder
☐ Sentence Reform Act of 1982
☐ 30% Range 1
☐ 35% Range 2
☐ 40% Range 2
☐ 1st Degree Murder

Concurrent with:

Consecutive to:

Sentenced to: Sentence Length:
☒ TDOC 33 Years ___ Months ___ Days ___ Life _____ Life without Parole _____ Death
Mandatory Minimum Sentence (applicable to T.C.A. 39-17-417 in School Zone) _____
☐ Workhouse ☐ County Jail ___ Years ___ Months ___ Days ___ Hours ___ Week-ends ___ Periodic:(_____)
Mandatory Minimum Sentence (applicable to T.C.A. 55-10-403; 55-50-504; 39-17-417; 39-13-513 and 39-13-514 in School Zone)_____
Period of Incarceration to be Served Prior to Release on Probation___ Months ___ Days ___ Hours (Misdemeanors Only)
_____% Minimum Service Prior to Eligibility for Work Release, Furlough, Trusty Status and Rehabilitative Programs (Misdemeanors Only)
☐ Probation ☐ Diversion ___ Years ___ Months ___ Days Effective: _____
☐ Community Based Alternative ___ Years ___ Months ___ Days ___ Hours ___ Week-ends
Specify: _____

Pretrial Jail Credit Period: from 8/10/94 to 5/22/96 from __/__/__ to __/__/__ or Number of Days: 647

Court Ordered Fees and Fines
$ 30.00 Criminal Injuries Compensation Fund
$_____ Supervision
$_____ Child Support
$_____ Court Costs
$_____ FINE ASSESSED
The costs of this cause is accessed against the Defendant.

Restitution:
Victim Name _____
Address _____
Total Amount $ _____ $ _____ per month
☐ Unpaid Community Service: ___ Hours ___ Days ___ Weeks ___ Months

☒ The Defendant having been found guilty is rendered infamous.

Special Conditions:

Judge Craft 5-23-96

Chris Craft
Judge

Judge's Signature

4/23/96
Date of Entry of Judgment

Attorney for State/Signature (optional)

Defendant's Attorney/Signature (optional)

Defendant's Signature

__/__/__
Date

ORIGINAL - CRIMINAL COURT CLERK
COPY - TN DEPT. OF CORRECTION - MIS-SMS
COPY - SENTENCING COMMISSION
COPY - JAIL

[JS-AMEN.doc REVISED 12/20/95]

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IN THE COURT OF CRIMINAL APPEALS OF
TENNESSEE AT JACKSON

SEPTEMBER 1997 SESSION

NO. 02C01-9611-CR-00418
SHELBY COUNTY

STATE OF TENNESSEE,
Appellee,

VS.

WILBERT K. ROGERS
(A.K.A. PERSON ROGERS),
Appellant.

HON. CHRIS CRAFT, JUDGE
(Second degree murder)

FOR THE APPELLANT:	FOR THE APPELLEE:
A. C. WHARTON, JR. Shelby County Public Defender WALKER GWINN (On appeal) TONY N. BRAYTON (At trial) Assistant Public Defenders 201 Poplar Ave. Suite 201 Memphis, TN 38103	JOHN KNOX WALKUP Attorney General and Reporter SARAH M. BRANCH Assistant Attorney General 450 James Robertson Parkway Nashville, TN 37243-0493 WILLIAM GIBBONS District Attorney General AMY WEIRICH Assistant District Attorney General 201 Poplar Ave. Suite 301 Memphis, Tennessee 38103

OPINION FILED: Oct. 17 1997

AFFIRMED

JOE G. RILEY, JUDGE

OPINION

Defendant was convicted by a Shelby County jury of second degree murder and sentenced to thirty-three (33) years as a Range II, Multiple Offender. Defendant brings one issue for our review whether the judgment should be modified to criminal attempt to commit murder because the victim's death did not occur within a year and a day of the alleged mortal wound. We find that the Criminal Sentencing Reform Act of 1989 abolished this common law defense and affirm the judgment of the trial court.

FACTS

Although the sufficiency of the evidence is not at issue, a review of the facts is instructive. Lisa Sledge, paramour of the victim, James Bowdery, testified that on May 6, 1994, she had been entertaining the victim during the afternoon of the incident when the defendant arrived to do his laundry, a standard practice. Sledge, Bowdery, and the defendant played cards and drank until about 8:00 p.m. Sledge and Bowdery went to sleep in the upstairs bedroom. Defendant was asleep on the downstairs sofa. At some point before daybreak, the defendant came into the bedroom asking where his money was, stabbed the victim with a butcher knife, and left. Ms. Sledge called 9-1-1.

Dr. Jerry T. Francisco, a pathologist, testified at trial. Although the victim did not die until August 7, 1995, Dr. Francisco attributed the cause of death to the wounds sustained on May 7, 1994. His review of the medical records showed that Bowdery was stabbed in the heart, which caused the heart to stop. As a result, he developed cerebral hypoxia. This deprivation of oxygen to the brain caused him to become comatose. He remained in this vegetative state and developed a kidney infection, which is not unusual for such patients. He died on August 7, 1995, approximately sixteen (16) months after the defendant had wounded him.

Defendant presented no proof.

COMMON LAW DEFENSE

The sole issue on appeal is whether the second degree murder conviction must be modified since the victim did not die within a year and a day of the infliction of the mortal wound. The "year-and-a-day rule" was the common law requirement. *See Percer v. State*, 118 Tenn. 765, 103 S.W. 780 (1907); *Cole v. State*, 512 S.W.2d 598 (Tenn. Crim. App. 1974).

This Court has considered this question previously in *State v. Ruane*, 912 S.W.2d 766, 774 (Tenn. Grim. App. 1995), and held the Criminal Sentencing Reform Act of 1989 abolished common law defenses. Affirmative defenses are listed by statute, and the "year-and-a-day rule" is not listed among those defenses now available. *Id.*, Tenn. Code Ann. § 39-11-204. Furthermore, Tenn. Code Ann. § 39-11-203(e)(2) specifically abolishes all common law defenses. We, therefore, conclude the "year-and-a-day rule" defense is no longer viable in Tennessee.

Defendant's contention that the abolition of this defense is an *ex post facto* violation is also without merit. Tenn. Code Ann. § 39-11-203 went into effect in 1989. The mortal wound was inflicted in 1994.

CONCLUSION

The judgment of the trial court is affirmed in all respects.

/s/ Joe G. Riley
JOE G. RILEY, Judge

CONCUR:

/s/ Joe B. Jones
Joe B. JONES, PRESIDING JUDGE

/s/ David H. Welles
DAVID H. WELLES, JUDGE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON

[Filed Oct. 17, 1997]

NO. 02C01-9611-CR-00418
SHELBY COUNTY NO. 95-09161
(Second Degree Murder)

AFFIRMED

STATE OF TENNESSEE,
Appellee,

vs.

WILBERT K. ROGERS
(A.K.A. PERSON ROGERS),
Appellant.

JUDGMENT

Came the appellant, Wilbert K Rogers, a.k.a. Person Rogers, by counsel, and the state, by the Attorney General, and this cause was heard on the record on appeal from the Criminal Court of Shelby County. After a thorough review of the records, briefs, and the law governing the issues presented for review, it is the opinion of this Court that the judgment of the trial court should be affirmed.

It is, therefore, ordered and adjudged that the judgment of the trial court is affirmed, and the case is remanded to the Criminal Court of Shelby County for collection of costs accrued below.

Cost of appeal are taxed to the state since appellant is indigent.

PER CURIAM

Joe G. Riley. Judge
Joe B. Jones. Presiding Judge
David H. Welles, Judge

IN THE SUPREME COURT OF TENNESSEE AT JACKSON

(HEARD AT PARIS)

[Filed May 24, 1999]

No. 02S01-9804-CR-00035

STATE OF TENNESSEE,
Appellee,

v.

WILBERT K. ROGERS,
Appellant.

For the Appellant:

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Assistant Public Defender
Memphis, Tennessee

W. Mark Ward
Assistant Public Defender
Memphis, Tennessee

Tony N. Brayton
Assistant Public Defender
Memphis, Tennessee
(Trial Only)

For the Appellee:

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Attorney General & Reporter

Michael E. Moore
Solicitor General

Todd R. Kelley
Assistant Attorney General
Nashville, Tennessee

William L. Gibbons
District Attorney General
30th Judicial District

Amy Weirich
Assistant District Attorney General
Memphis, Tennessee

OPINION

AFFIRMED. DROWOTA, J.

The sole issue in this appeal is whether the common law year-and-a-day rule is currently a viable principle of criminal law in Tennessee. The defendant argued in the Court of Criminal Appeals that his conviction for second degree murder should be set aside because the victim's death did not occur within a year and one day of the fatal stab wounds. The Court of Criminal Appeals rejected the defendant's argument and affirmed his conviction upon finding that the common law year-and-a-day rule was abolished by the Criminal Sentencing Reform Act of 1989. For the reasons that follow, we hold that the rule was not abolished by the 1989 Criminal Sentencing Reform Act. However, the justifications originally supporting recognition of the rule have been eroded by advances in medical science, improved trial procedure, and sentencing reforms. Therefore, we hereby abolish the now obsolete common law year-and-a-day rule. Because the rule has been judicially abrogated by almost every court which has recently considered the issue, we conclude that our decision does not constitute an unforseeable judicial enlargement of a criminal statute; therefore, retrospective application of this decision is not barred by the ex post facto clauses of the state and federal constitutions.[1] Accordingly, we affirm, on the separate grounds stated, the judgment of the Court of Criminal Appeals which upheld the defendant's conviction of second degree murder.[2]

BACKGROUND

The facts relevant to the legal issue in this appeal are few and undisputed. On May 6, 1994, the defendant, Wilbert K. Rogers, stabbed the victim, James Bowdery, with a butcher

[1] *See* Tenn. Const. art. I, § 11; U.S. Const. art. I, § 10.

[2] Oral arguments were heard in this case on April 14, 1999, in Paris, Henry county, as part of this Court's S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project.

knife. One of the stab wounds penetrated the victim's heart. Bowdery was treated at the Regional Medical Center in Memphis, and during a procedure to repair the damage to his heart, he went into cardiac arrest. Bowdery was resuscitated, but he had developed cerebral hypoxia, a condition which results from a loss of oxygen to the brain. Bowdery's higher brain functions had ceased, and he remained in a comatose state until August 7, 1995, when he died from a kidney infection, a common complication experienced by comatose patients. Approximately fifteen months had passed from May 6, 1994, the day the defendant stabbed Bowdery, to August 7, 1995, the day Bowdery died. However, according to the undisputed testimony of Dr. Jerry T. Francisco, a pathologist and the medical examiner for Shelby County, the victim's death was caused by cerebral hypoxia "secondary to a stab wound to the heart."

Based upon this proof, the jury found the defendant guilty of second degree murder.[3] Relying upon the common law year-and-a-day rule, the defendant asserted in the Court of Criminal Appeals that his conviction should be modified to criminal attempt to commit murder because the victim's death had occurred more than a year and one day after the stabbing incident. The intermediate court rejected the defendant's argument and held that the Criminal Sentencing Reform Act of 1989 abolished common law defenses including the year-and-a-day rule. Because the Criminal Sentencing Reform Act became effective in 1989, approximately five years before the defendant committed this offense, the intermediate court also rejected the defendant's contention that abolition of the rule violates the ex post facto prohibitions of the state and federal constitutions. Thereafter, we granted the defendant's

[3] The defendant had been charged with first degree premeditated murder.

application for permission to appeal and now affirm, on different grounds, the judgment of the Court of Criminal Appeals.

YEAR-AND-A-DAY RULE

In this appeal, we are called upon to consider, for the first time since 1907, the common law year-and-a-day rule and to determine whether or not it currently is a viable rule of criminal law in Tennessee. The defendant argues that the rule was not abolished by the Criminal Sentencing Reform Act of 1989 because it relates to causation, which, according to the defendant, is an area of homicide law that is still governed by common law principles. While the defendant acknowledges that this Court has the authority to abrogate the rule, he argues that any judicial abrogation of the rule must be prospectively applied to avoid violating the ex post facto provisions of the state and federal constitutions. In response, the State argues that this Court should hold that the rule was abolished by the comprehensive Criminal Sentencing Reform Act of 1989. Alternatively, the State asks this Court to judicially abrogate the rule. The State asserts that a judicial abrogation of the rule can be retrospectively applied since it is not an unforeseeable judicial enlargement of a criminal statute. We begin our analysis of this issue with a brief overview of the historical development of the common law rule.

A. Historical Development

The year-and-a-day rule is deeply rooted in the common law. Its lineage is generally traced to the thirteenth century where the rule was originally utilized as a statute of limitations governing the time in which an individual might initiate a private action for murder known as "appeal of death." *See, e.g., United States v. Jackson*, 528 A.2d 1211, 1214 (D.C. 1987); *Commonwealth v. Lewis*, 409 N.E.2d 771, 773 (Mass. 1980); *People v. Stevenson*, 331 N.W.2d 1143, 145 (Mich. 1982); *State v. Vance*, 403 S.E.2d 495, 497 (N.C.

1991); *Commonwealth v. Ladd*, 166 A.2d 501, 503 (Pa. 1960); *State v. Pine*, 524 A.2d 1104, 1105 (R.I. 1987); Comment, *Taming a Phoenix: The Year-And-A-Day Rule in Federal Prosecutions for Murder*, 59 U. Chi. L. Rev. 1337, 1338 (1992). The "appeal of death" was a private and vindictive action instituted by an interested party and derived from the Germanic custom of "weregild," or compensation for death. *Id.* "Appeal of death" actions became obsolete and were abolished in 1819. *Lewis*, 409 A.2d at 772. By the eighteenth century, however, the year-and-a-day rule had been extended to the law governing public prosecutions so that a homicide prosecution could not be brought unless the victim died within a year and one day of the injury. *Jackson*, 528 A.2d at 1214; *Lewis*, 409 N.E.2d at 772.

Though the rule began in England, its applicability to criminal prosecutions in this country was acknowledged by the United States Supreme Court in 1894 as follows:

> In cases of murder the rule at common law undoubtedly was that no person should be adjudged "by any act whatever to kill another who does not die by it within a year and a day thereafter. . . ." And such is the rule in this country in prosecutions for murder, except in jurisdictions where it may be otherwise prescribed by statute.

Louisville, Evansville, & St. Louis R.R. Co. v. Clarke, 152 U.S. 230, 239, 14 S.Ct. 579, 581, 38 L.Ed. 422 (1894) (citations omitted) (civil wrongful death action). The viability of the rule in Tennessee was recognized in *Percer v. State*, 118 Tenn. 765, 777, 103 S.W. 780, 782 (1907), in which this Court, quoting *Wharton on Homicide*, stated: "[i]n murder, the death must be proven to have taken place within a year and a day from the date of the injury received." Sixty-seven years passed before the rule was next mentioned by the Court of Criminal Appeals. *See Cole v. State*, 512 S.W.2d 598, 601 (Tenn. Crim. App. 1974) ("The common law provides that

death must ensue within a year and a day from the infliction of the mortal wound to constitute punishable homicide."). Our research of reported cases reveals that the rule was most recently invoked by a defendant in a 1995 decision of the Court of Criminal Appeals, *State v. Ruane*, 912 S.W.2d 766, 774 (Tenn. Crim. App. 1995). In *Ruane*, as here, the intermediate court opined that the common law rule had been abolished by enactment of the 1989 Criminal Sentencing Reform Act. *Id.* Interestingly, the discussion of the rule in each of these cases appears to be dicta. It was not a ground upon which the decision rested. Despite the paucity of case law, both parties to this appeal agree that the year-and-a-day rule was a part of the common law of this State.

Three justifications are ordinarily given for the common law rule. The first and most often cited justification is that thirteenth century medical science was incapable of establishing causation beyond a reasonable doubt when a great deal of time had elapsed between the injury to the victim and the victim's death. Therefore, it was presumed that a death which occurred more than a year and one day from the assault or injury was due to natural causes rather than criminal conduct. *See State v. Ruane*, 912 S.W.2d 766, 774 (Tenn. Crim. App. 1995); *People v. Snipe*, 192 Cal.Rptr. 6, 7 (Ca. Ct. App. 1972); Jackson, 528 A.2d at 1216; *Jones v. Dugger*, 518 So.2d 295, 296 (Fla. Ct. App. 1987); *State v. Cross*, 401 S.E.2d 510, 511 (Ga. 1991); *People v. Carrillo*, 646 N.E.2d 582, 584 (Ill. 1995); *Lewis*, 409 N.E.2d at 773; *Stevenson*, 331 N.W.2d at 145; *State v. Gabehart*, 836 P.2d 102, 105 (N.M. Ct. App. 1992); *Vance*, 403 S.E.2d at 495; *State v. Hefler*, 310 S.E.2d, 313 (N.C. 1984); *State v. Sandridge*, 365 N.E.2d 898, 899 (Ohio Ct. C.P. 1977); *Ladd*, 166 A.2d at 506; *Pine*, 524 A.2d at 1106.

Second, it has often been said that the rule arose from the early function of the jury as a reporter of the happenings of the vicinage. Even if expert medical testimony had been

adequate to establish causation at common law, it would not have been admissible. Unlike current procedure, in early English courts, jurors were required to rely upon their own knowledge to reach a verdict, and they could not rely upon the testimony of witnesses having personal knowledge of the facts or upon expert opinion testimony. *Jackson*, 528 A.2d at 1216; *Lewis*, 409 N.E.2d at 773; *Stevenson*, 331 N.W.2d at 145-46; *Sandridge*, 365 N.E.2d at 899.

Finally, the rule has occasionally been characterized as an attempt to ameliorate the harshness of the common law practice of indiscriminately imposing the death penalty for all homicides—first degree murder and manslaughter alike. *Jackson*, 528 A.2d at 1216; *Lewis*, 409 N.E.2d at 773; *Hefler*, 310 S.E.2d at 313; *Ladd*, 166 A.2d at 506.

B. Modern Status

Despite its early common law recognition and near universal acceptance, the rule has fallen into disfavor and has been legislatively or judicially abrogated by the vast majority of jurisdictions which have recently considered the issue.[4]

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[4] The rule has been abolished by the legislature in four states. *See* Cal. Penal Code § 194 (West 1988 & Supp. 1999); Md. Ann. Code art. 27, § 415 (1996); Mo. Ann. Stat. § 565.003 (Vernon 1979 & Supp. 1999); Wash. Rev. Code Ann. § 9A.32.010 (West 1988 & Supp. 1999)(three-years-and-a-day). The highest courts of four additional states have held that the rule was abrogated when it was not included as part of a comprehensive criminal code adopted by the legislature. *Cross*, 401 S.E.2d at 511 (Ga.); *Carillo*, 646 N.E.2d at 584 (Ill.); *People v. Brengard*, 191 N.E. 850 (N.Y. 1934); *State v. Hudson*, 642 P.2d 331 (Or. 1982). Four other states, Colorado, Delaware, North Dakota, and Utah, have repealed the statute which had codified the rule. *Minister*, 486 A.2d at 1200 n.4. The rule has been judicially abrogated in ten jurisdictions. *See Jackson*, 528 A.2d at 1218 (D.C); *Jones*, 518 So.2d at 298 (Fla); *Lewis*, 409 N.E.2d at 773 (Mass.); *Stevenson*, 331 N.W.2d at 143 (Mich); *State v. Young*, 390 A.2d 556 (N.J. 1978); *Gabehart*, 836 P.2d at 102 (N.M.); *Vance*, 403 S.E.2d at 495 (N.C.); *Sandridge*, 365 N.E.2d at 899 (Ohio); *Ladd*, 166 A.2d at 506 (Pa.); *Pine*, 524 A.2d at 1106 (RI.). Finally, the

Most courts describe the rule as outmoded and obsolete since the reasons justifying its recognition no longer exist. In characterizing the rule as an anachronism, courts have particularly emphasized the many advances of medical science. For example, the Ohio Court of Common Pleas stated:

> [t]oday, the retention of the "year and a day" rule is clearly an anachronism. The jury may now rely on the testimony of expert witnesses and need not decide issues on the basis of their own individual knowledge. Furthermore, since great advances have been made in scientific crime detection and scientific medicine, the doubt that a mortal blow is the cause of death, when death ensues a year and a day after the blow, has been largely removed. Consequently, a period of a year and a day after which death is conclusively presumed to result from natural causes is no longer realistic.

Sandridge, 365 N.E.2d at 899. Likewise, in holding that the rule had been implicitly abrogated by its omission from a comprehensive criminal code enacted by the legislature, the Illinois Supreme Court stated:

> [m]oreover, we note the legislature's wisdom in abolishing the year-and-a-day rule. It was a remnant from the days when medicine and science, both as to

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Connecticut Supreme Court has held that the rule was not a part of the common law of that state. *Valeriano v. Bronson*, 546 A.2d 1380 (Ct. 1988). Of those courts which have squarely faced the issue, only one, the Maryland Court of Appeals, has declined to abrogate the rule and deferred to legislative judgment. *State v. Minster*, 486 A.2d 1197 (Md. 1985). Shortly thereafter, the Maryland state legislature abolished the rule. Given these recent pronouncements, the Rhode Island Supreme Court opined that "the long life of the rule may result from the infrequency with which the issue has been raised" and from the fact that courts "have not been given the opportunity to address it" *Pine*, 524 A.2d at 1106; *see also Lewis*, 409 N.E.2d at 773.

> diagnosis and treatment, were so unsophisticated that mortally wounded persons commonly died shortly after the infliction of a grievous wound. In such circumstances, it was reasonable to presume that if a wounded person died more than a year from the time of the wound, the cause of death was other than the wound. Modern medicine, however, allows doctors to employ a variety of extraordinary, even heroic, means to save and prolong the lives of victims for years, as opposed to days or months. Also, diagnostic post-mortem pathological procedures can now discover and define the cause of death with great particularity and precision.

Carillo, 646 N.E.2d at 585. Similarly, in judicially abrogating the rule, the Michigan Supreme Court stated:

> [t]he advances of modern medical science, by extending life and by providing strong evidence of the cause of death, have undermined the wisdom of the irrebuttable presumption that the death of one who expires more than a year and a day after receiving an injury was not caused by the injury. The availability of modern life sustaining equipment and procedures raises the specter of the choice between terminating life-support systems or allowing the defendant to escape a murder charge. The presumption was wooden and arbitrary from the beginning, since it prevented a murder conviction even in those rare cases when causation could be proved. Now, when medical causation can be proven with much greater frequency and certainty, the old rule is simply too often demonstrably wrong to be upheld.

Stevenson, 331 N.W.2d at 146. The North Carolina Supreme Court took "judicial notice of the rapid development and proliferation of the art and science of medicine and crime detection," and stated:

> Sophisticated medical tests, analyses, and diagnoses allow positive evidence to be presented to a jury on questions of causation in criminal prosecutions. For the courts to remain judicially oblivious of these advances when considering whether to extend an ancient common law rule would be folly. We must let the light of scientific development illuminate the legal issues of today. It would be incongruous indeed that medical science has developed to the point that it may prolong human life for long periods if that same development be utilized to bar conviction of a killer by prolonging the life of his victim.

Hefler, 310 S.E.2d at 313. Finally, the Massachusetts Supreme Court observed that the rule is "anachronistic" considering "the advances of medical and related science in solving etiological problems as well as in sustaining or prolonging life in the face of trauma or disease" and emphasized that "the relatively short time limit is seen as not only capricious but as senselessly indulgent toward homicidal malefactors." *Lewis*, 409 N.E.2d at 773.

Although the rule has been judicially abrogated in a number of jurisdictions, none of those courts have adopted a new time limit to replace the year-and-a-day rule. In declining to do so, courts emphasize that no arbitrary time frame is needed because abolition of the year-and-a-day rule does not relieve the State of its burden of proving causation beyond a reasonable doubt. *See e.g. Jackson*, 528 A.2d at 1218 ("Nor is it to suggest that abrogation of the rule would remove all limitations on assessing culpability; limitations necessarily would exist by virtue of the requirements of due process and the government's burden to prove causation beyond a reasonable doubt."); *Stevenson*, 331 N.W.2d at 146 ("Of course, abolition of the rule would not relieve the prosecution of its duty to prove all of the elements of the crime, including proximate causation, beyond a reasonable doubt."); *Sandridge*, 365 N.E.2d at 899 ("Finally, it must be emphasized that the refusal to apply the 'year and a day' rule does not deprive the defendant of any fundamental right. In all homicide cases, the burden always falls upon the prosecution to prove proximate causation that death flowed from the wrongful act of the defendant. That must be the critical determinant, and not the expiration of some archaic, arbitrary time period."). These courts also point out that there is no statute of limitations for murder prosecutions and find implementation of an arbitrary time limit which bars murder prosecutions if the victim does not die within a specified period of time inconsistent with public policy. *See e.g. Stevenson*, 331 N.W.2d at 146 ("No repose or statute of limitations is available for murder in this state."); *Ladd*, 166 A.2d at 506 ("Society is free to prosecute murderers without a statutory limitation, and it is possible that evidence and witnesses may be lost during a long interval between crime and trial. It is therefore not a strange idea to put no restriction of time upon the death of the victim and to require only proof of causation of conventional quality at the trial.").

Therefore, regardless of whether its demise was achieved by legislative or judicial action, in other jurisdictions, abolition of the year-and-a-day rule has not altered the general principle that causation be proven beyond a reasonable doubt. Its abolition simply allows the State to have the opportunity to attempt to prove causation. Having considered the historical development of the rule and the modern trend away from application of the rule, we must next decide whether the year-and-a-day rule remains viable in Tennessee.

C. Tennessee Status

The Court of Criminal Appeals in this case held that the year-and-a-day rule was abrogated by the Criminal Sentencing Reform Act of 1989. The appellant contends that the intermediate court erred in reaching this conclusion. Rogers

argues that the year-and-a-day rule is not a defense, but a substantive principle of law relating to causation. Rogers argues that causation is an area of homicide law which is still governed by common law principles. Accordingly, Rogers argues that the 1989 Act did not abolish the common law year-and-a-day rule which relates to causation. As support for his argument, Rogers relies upon Tenn. Code Ann. § 39-11-104 (1997 Repl.), which provides that "[t]he provisions of this title shall be construed according to the fair import of their terms, *including reference to judicial decisions and common law interpretations*, to promote justice, and effect the objectives of the criminal code." (Emphasis added). Rogers contends that this statutory section is further supported by the Sentencing Commission Comments to Tenn. Code Ann. § 39-11-102 (1997 Repl.), which state that "the commission does not intend to abrogate the interpretive rules developed under common law and specifically includes such interpretations under § 39-11-104."

Agreeing with the defendant that the year-and-a-day rule is a substantive principle of law rather than a common law defense, the State nonetheless argues that the year-and-a-day rule was abrogated by the 1989 Act because it was not included as part of the definition of criminal homicide. *See* Tenn. Code Ann. § 39-13-201 (1997 Repl.). As support for its argument, the State points to Tenn. Code Ann. § 39-11-101(2) (1997 Repl.), which states that one objective of the 1989 Criminal Code was to "give fair warning of what conduct is prohibited, and guide the exercise of official discretion in law enforcement, by defining the act and culpable mental state which together constitute the offense." The State also relies upon Tenn. Code Ann. § 39-11-102(a) (1997 Repl.), which provides that "[c]onduct does not constitute an offense unless it is defined as an offense by statute, municipal ordinance, or rule authorized by and lawfully adopted under a statute." Additionally, the State relies upon the Sentencing Commission Comments to Section

102 which state "[i]t is the intent of the commission that common law offenses be replaced with statutory offenses to effectuate the goals set forth in § 39-11-101(1) and (2)." Finally, the State relies upon court decisions from New York and Georgia which have held that the rule was abolished by passage of a comprehensive criminal code. *See Brengard*, 191 N.E. at 850; *Cross*, 401 S.E.2d at 511.

We have considered the provisions of the 1989 Act, and the arguments advanced by both the defendant and the State, and conclude that the common law rule was not abolished by the Act. First, we agree with the defendant that the rule was not abolished by Tenn. Code Ann. § 39-11-203(e)(2)(1997 Repl.) which provides that "[d]efenses available under common law are hereby abolished." While similar in some respects to a defense in the sense that it precludes a conviction, the year-and-a-day rule is even more powerful than a defense because it entirely precludes a murder prosecution. Secondly, we disagree with the State's basic assertion that the rule was implicitly abolished by its omission from the statute. As the defendant points out, causation is not explicitly included within the statutory definition of criminal homicide; yet, the State conceded at oral argument that the common law causation requirement was not abolished by the 1989 Act. *See State v. Barnes*, 703 S.W.2d 611 (Tenn. 1985); *State v. Randolph*, 676 S.W.2d 943 (Tenn. 1984); *Letner v. State*, 156 Tenn. 68, 299 S.W. 1049 (1927); *Copeland v. State*, 154 Tenn. 7, 285 S.W. 565 (1926); *Odeneal v. State*, 128 Tenn. 60, 157 S.W. 419 (1913) (discussing the requirement that causation be proven beyond a reasonable doubt). Statutes in derogation of the common law are to be strictly construed. *Perry v. Sentry Ins. Co.*, 938 S.W.2d 404, 406 (Tenn. 1996). As the defendant points out, common law judicial decisions and interpretive rules are explicitly approved by the statute and by the Sentencing Commission Comments. In addition, criminal statutes are to be strictly construed against the State and in favor of the

defendant. *State v. Alford*, 970 S.W.2d 944, 947 (Tenn. 1998); *State v. Bobo*, 727 S.W.2d 945, 952 (Tenn. 1987). For these reasons, in the absence of a statutory provision explicitly abolishing the common law rule, we are constrained to disagree with the State's assertion that the year-and-a-day rule was abolished by the 1989 Act.

The State strongly urges this Court to judicially abrogate the common law rule. While the defendant concedes that this Court has the power to abrogate the rule, he nonetheless argues that we should defer action on this issue to the judgment of the General Assembly. Rogers contends that the General Assembly is in a better position to determine an appropriate substitute time limit to replace the year-and-a-day rule.

This Court has "not hesitated to abolish obsolete common-law doctrines," and we have recognized that "we have a special duty to do so where it is the Court, rather than the Legislature, which has recognized and nurtured" the common law rule. *Dupis v. Hand*, 814 S.W.2d 340, 345 (Tenn. 1991) (internal quotations and citations omitted). Indeed, we have stated that "we abdicate our function, in a field peculiarly non-statutory, when we refuse to consider an old and court-made rule." *Id*. Since, as previously stated, the year-and-a-day rule has its roots in the common law, and has in fact never been a part of the statutory law of this State, we refuse the defendant's suggestion to defer this issue to the General Assembly's judgment. This is an issue of law over which our review is particularly appropriate. Accordingly, we will next consider whether the rule should be judicially abrogated.

Without question, the reasons which prompted common law courts to recognize the rule no longer exist. Medical science can now sustain the critically wounded for months and even years beyond what might have been imagined only a few decades ago. Comparable progress has been made in the development of diagnostic skills, so that problems of medical

causation are more readily resolved. Modern pathologists are able to determine the cause of death with much greater accuracy than was possible in earlier times. Moreover, jurors today may rely upon expert testimony, even when the testimony relates to an ultimate issue of fact such as causation. *See* Tenn. R. Evid. 704; *State v. Shuck*, 953 S.W.2d 662 (Tenn. 1997). Indeed, adoption of the rules of evidence has made the admission of expert testimony routine. *See McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997) (discussing admission requirements). Finally, the death penalty is no longer indiscriminately imposed for all homicides. In Tennessee, the death penalty is a possible punishment for only one type of homicide—first degree murder. Even in first degree murder cases, the death penalty is not automatically sought by the prosecutor, nor is it automatically imposed by a jury. The defendant is given a jury sentencing hearing, replete with procedural and substantive safeguards. *See* Tenn. Code Ann. § 39-13-204-208 (1997 Repl. & Supp. 1998).

"Where the reason fails the rule should not apply." *Brown v. Selby*, 206 Tenn. 71, 332 S.W.2d 166, 169(1960). We have previously observed that "[a]s a living and breathing thing, the law changes when necessary to serve the needs of the people. When this basic purpose of the law is slighted or overlooked, then it loses a high degree of its majesty." *Dupis*, 814 S.W.2d at 345 (citations omitted). Clearly, advances in medical science, improved trial procedure, and sentencing reform have eroded the reasons originally supporting the common law year-and-a-day rule. Accordingly, we hereby abolish the common law rule, and by doing so, join the majority of other jurisdictions which have recently considered the issue. We also reject the defendant's invitation to adopt a substitute time limit to replace the year-and-a-day rule. We agree with those courts which have held that no arbitrary time frame is needed because abolition of the year-and-a-day rule does not relieve the State of its burden of proving causation

beyond a reasonable doubt. *See e.g. Jackson*, 528 A.2d at 1218; *Stevenson*, 331 N.W.2d at 146; *Sandridge*, 365 N.E.2d at 899. This safeguard is sufficient to satisfy due process. Moreover, in light of the fact that there is no statute of limitations for murder prosecutions in Tennessee,[5] imposition of an arbitrary time limit to bar murder prosecutions if the victim does not die within a specified period of time is not consistent with public policy.

D. Ex Post Facto Violation

Having determined that the common law rule should be abolished, we must next consider the defendant's claim that the ex post facto clauses of the state and federal constitution require that our decision be prospectively applied. The State asserts that abrogation of the rule can be retrospectively applied since it is not an unforeseeable judicial enlargement of a criminal statute.

Both the United States Constitution, in Article I, Sections 9 and 10, and the Tennessee Constitution, in Article I, Section 11, forbid the passage of any ex post facto law by Congress or the General Assembly. An ex post facto law within the meaning of the federal and state constitution has been defined as one that

> makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. Second, every law that aggravates a crime, or makes it greater than it was, when committed. Third, every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. Fourth, every law that alters the legal rules of evidence, and receives less, or different,

[5] Tenn. Code Ann. § 40-2-101(a) (Supp. 1998).

> testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798); *see also State v. Pearson*, 858 S.W.2d 879, 881 (Tenn. 1993); *Miller v. State*, 584 S.W.2d 758, 761 (Tenn. 1979) (adopting the categories identified in *Calder* and stating that "every law which, in relation to the offense or its consequences, alters the situation of a person to his disadvantage" constitutes an ex post facto law).

Although both the federal and state constitutional provisions refer only to legislative acts, the United States Supreme Court has held that the Fifth and Fourteenth Amendments prohibit retroactive application of any "judicial construction of a criminal statute [that] is unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue." *Bouie v. City of Columbia*, 378 U.S. 347, 354, 84 S.Ct. 1697, 1703, 12 L.Ed.2d 894 (1964) (internal quotations and citations omitted); *accord, Marks v. United States*, 430 U.S. 188, 191-92, 97 S.Ct. 990, 992-93, 51 L.Ed.2d 260 (1977). Applying these decisions to the facts in this case, we conclude that judicial abrogation of the year-and-a-day rule is not an unexpected judicial construction that is indefensible by reference to prior law. Prior to the time the defendant stabbed the victim, the common law rule had been judicially or legislatively abolished in many other jurisdictions. *See* Footnote 4, *supra*. Several additional state courts had held that the rule was abolished by its omission from comprehensive criminal codes similar to the 1989 Act. *Id.* Moreover, the year-and-a-day rule has been mentioned favorably in this State only once since 1907, and that statement is in a decision of the Court of Criminal Appeals which is more than twenty years old. Our research indicates that the rule has never served as the ground of decision in any

Tennessee case. As previously stated, the Court of Criminal Appeals in *Ruane* opined that the year-and-a-day rule had been abolished by passage of the Act. Though the decision in *Ruane* was rendered after the defendant stabbed the victim in this case, its reasoning reflects the uncertainty surrounding the continuing viability of the rule in light of the passage of the 1989 Act. Given the fact that the rule has been abolished by every court which has squarely faced the issue, and given the fact that the validity of the rule has been questioned in this State in light of the passage of the 1989 Act, we conclude that our decision abrogating the rule is not an unexpected and unforseen judicial construction of a principle of criminal law. Moreover, we emphasize that abolition of the rule does not allow the State to obtain a conviction upon less proof, nor does its abolition impose criminal sanctions for conduct that was heretofore innocent. Accordingly, we apply our decision abolishing the rule retroactively to the facts of this case and affirm the defendant's conviction. *See Snipe*, 102 Cal. Rptr. at 9; *Sandridge*, 365 N.E.2d at 899 (Ohio); *Ladd* 166 A.2d at 506 (Pa.). *But see Jackson*, 528 A.2d at 1223 (D.C.); *Lewis*, 409 N.E.2d at 775 (Mass.); *Stevenson*, 331 N.W.2d at 148 (Mich.); *Vance*, 403 S.E.2d at 499 (NC.); *Gabehart*, 836 P.2d at 105 (N.M.); *Young*, 390 A.2d at 559 (N.J.); *Pine*, 524 A.2d at 1107 (RI.).

CONCLUSION

After carefully considering the entire record, arguments of counsel, and relevant statutes and precedent, we hereby abolish the obsolete common law year-and-a-day rule and apply our decision retroactively since it does not constitute an unforseeable judicial enlargement of a criminal statute. Accordingly, we affirm, on the separate grounds stated, the judgment of the Court of Criminal Appeals which upheld the defendant's conviction of second degree murder. It appearing that the defendant in this cause is indigent, costs will be paid by the State of Tennessee.

FRANK F. DROWOTA, III,
Justice

Concur:

Anderson, C.J.
Birch, Holder, Barker, JJ.

SUPREME COURT, JACKSON

[Filed May 24, 1999]

No. 02S01-9804-CR-00035

SHELBY CRIMINAL

Conviction Affirmed.
Court of Criminal Appeals Affirmed.

STATE OF TENNESSEE,
Appellee,

v.

WILBERT K. ROGERS,
Appellant.

JUDGMENT

This cause came on to be heard as part of the SCALES Project in Paris, Tennessee, upon the record on appeal from the Court of Criminal Appeals, application for permission to appeal having been granted, briefs and argument of counsel; and upon consideration thereof, we hereby abolish the obsolete common law year-and-a-day rule and apply our decision retroactively since it does not constitute an unforseeable judicial enlargement of a criminal statute.

In accordance with the opinion filed herein, it is ORDERED AND ADJUDGED that the judgments of the trial court and the Court of Criminal Appeals upholding the defendant's conviction for second degree murder are hereby affirmed.

It appearing that the appellant, Wilbert K. Rogers, is indigent, costs will be paid by the State of Tennessee.

5/24/99

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

[Filed June 21, 1999]

No. 02S01-9804-CR-00035

STATE OF TENNESSEE,
Appellee,

v.

WILBERT K. ROGERS,
Appellant.

ORDER

The appellant has filed a petition for rehearing in this appeal pursuant to Tenn. R. App. P. 39. We have considered all of the arguments raised in the petition, and we have found them to be without merit. It is, therefore, ORDERED that the petition is denied.

PER CURIAM

(5)

Supreme Court, U.S.
FILED
JUN 30 2000
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No. 99-6218

In The

Supreme Court of the United States

WILBERT K. ROGERS,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Tennessee

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the retroactive application of a judicial abolishment of the substantive rule of criminal law known as the "year-and-a-day rule" to an assault committed five years prior to that abolishment violates the Fourteenth Amendment of the United States Constitution?

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JURISDICTION

The opinion of the Supreme Court of Tennessee was entered on May 24, 1999. The Supreme Court of Tennessee denied a Petition to Rehear on June 21, 1999. The petition for a writ of certiorari was filed on September 16, 1999, and was granted on May 22, 2000. Petitioner invokes the jurisdiction of this Court under the authority of 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner submits that this case involves application of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Due Process Clause is contained in Section 1 of the Fourteenth Amendment and provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The case also involves Article I, Section 10 of the United States Constitution, which provides that:

> No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

STATEMENT OF THE CASE

A. Procedural History

On August 9, 1994, Petitioner Wilbert K. Rogers was indicted by the Shelby County (Tennessee) Grand Jury and charged with the May 7, 1994 attempted first degree murder of James Bowdery. (JA, 2-3). The victim died in August 1995, more than a year-and-a-day after the assault. (R. Vol. II, 3, 138-139, 142). Thereafter, on September 12, 1995, a new indictment was returned against Petitioner charging him with first degree murder. (JA, 4-5; R. Vol. I, 1-13). The Shelby County Public Defender was appointed to represent Petitioner who was found guilty of second degree murder by a petit jury on January 31, 1996. He was sentenced to thirty-three years imprisonment. (JA, 6; R. Vol. I, 34).

On appeal to the Tennessee Court of Criminal Appeals, Petitioner argued that he could not be convicted of murder because of the common law year-and-a-day rule enunciated by the Tennessee Supreme Court in *Percer v. State*, 103 S.W. 780, 782 (1907), and cited as authority by the Tennessee Court of Criminal Appeals in *Cole v. State*, 512 S.W.2d 598, 601 (Tenn. Crim. App. 1974). Petitioner contended that, at most, he could be convicted of attempted second degree murder which carries a determinative sentence with a range of eight to thirty years imprisonment.

In an opinion filed on October 17, 1997, the Tennessee Court of Criminal Appeals rejected Petitioner's appeal, holding that the state legislature abolished the year-and-a-day rule by its failure to specifically include it as a defense in the 1989 codification of the criminal code. (JA, 9). As authority, the Court of Criminal Appeals cited TENN. CODE ANN. § 39-11-203(e)(2) which specifically abolished all common law defenses and its prior opinion, *State v. Ruane*, 912 S.W.2d 766 (Tenn. Crim. App. 1995), which was decided *after* the assault on Mr. Bowdery. In *Ruane*, the Court of Criminal Appeals characterized the year-and-a-day rule as a common-law defense and found that all common-law defenses had been abolished by the Tennessee Criminal Sentencing Reform Act of 1989. *Id.* at 774.

The Tennessee Supreme Court granted Petitioner's Application for Permission to Appeal and on May 24, 1999 issued its opinion as *State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999). The Tennessee Supreme Court rejected the notion that the year-and-a-day rule was a criminal defense reasoning that "[w]hile similar in some respects to a defense in the sense that it precludes a conviction, the year-and-a-day rule is even more powerful than a

defense because it entirely precludes a murder prosecution." *Id.* at 400. (JA, 23). It found that the year-and-a-day rule had not been abolished by the codification of the Tennessee Criminal Code and thus was in full force and effect when Bowdery was assaulted. *Id.* (JA, 24). However, it found that the common law year-and-a-day rule was no longer justified and judicially abolished the rule.

The Tennessee Supreme Court concluded that its 1999 abrogation of the rule could be retroactively applied to the 1994 assault without violating the Fourteenth Amendment of the United States Constitution because its decision was "not an unexpected and unforseen judicial construction of a principle of criminal law." *Id.* at 402. (JA, 27-28).

On June 21, 1999, the Tennessee Supreme Court denied a Petition to Rehear. (JA, 31). A petition for writ of certiorari was filed on September 16, 1999 and was granted, along with a motion to proceed in forma pauperis, on May 22, 2000.

B. Statement of Facts

This case is purely a question of law. There is no factual dispute that the victim was stabbed on May 6, 1994 and died in August 1995. *Id.* at 395. (JA, 13).

SUMMARY OF THE ARGUMENT

Although the Ex Post Facto Clause contained in Article I, § 10 applies only to restrict the actions of state legislatures, this Court has held that general ex post facto

principles are applicable to judicial rulings through the Due Process Clause of the Fourteenth Amendment. More specifically, this Court has held that the Due Process Clause of the Fourteenth Amendment bars retroactive application of judicial rulings in criminal cases that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *See Bouie v. City of Columbia*, 378 U.S. 347, 353-354 (1964), and *Marks v. United States*, 430 U.S. 188, 191-192 (1977).

Three issues must be addressed to determine whether the decision of the Tennessee Supreme Court is contrary to due process. First, whether general ex post facto principles prohibit the retroactive abolition of the year-and-a-day rule if accomplished by an act of the Tennessee legislature. Second, whether any such prohibition applies to the Tennessee Supreme Court through the Due Process Clause. Third, whether the decision of the Tennessee Supreme Court to abolish the year-and-a-day rule was unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.

Petitioner submits that basic ex post facto principles clearly prohibit the Tennessee legislature from retroactively eliminating the year-and-a-day rule, that the purposes behind the prohibition on ex post facto laws are so fundamental that Due Process prevents the Tennessee Supreme Court from obtaining the same result by judicial decree, and finally that the Tennessee Supreme Court's decision to abolish the rule was unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.

The decision of the Tennessee Supreme Court to overrule its own precedent and judicially abolish the year-and-a-day rule was so unexpected and indefensible with respect to the law that had been expressed in Tennessee that it relied upon two extremes to justify its conclusion that the ruling was not unexpected and indefensible. First, the Court justified the ruling by looking to the law of other states, reasoning that abolition of the rule in other states would put a defendant on notice that the rule was in question in Tennessee. Under this theory, Tennessee citizens could not rely upon the rulings of the Tennessee Supreme Court as stating the status of the law in Tennessee, but must be cognizant of the law in all fifty states. The mere fact that the Tennessee Supreme Court had to look to the law of other states demonstrates that the law in Tennessee did not render its opinion expected and defensible.

Second, after the Tennessee Supreme Court rejected all prosecution arguments that the Tennessee Criminal Code of 1989 had actually eliminated the year-and-a-day rule as a substantive requirement, the Court, nevertheless, justified its conclusion that its rejection of the rule was foreseeable by asserting that the very same Criminal Code had put the viability of the rule in question. The implied reasoning of the Court must be that, although properly interpreted the Criminal Code did not affect the year-and-a-day rule, the Criminal Code could have theoretically[1] been misinterpreted as affecting the rule, thus,

[1] The word "theoretically" is used because no court had actually misinterpreted the Criminal Code when the acts were committed in the present case.

causing its continued viability to be in question. It is submitted that the Tennessee Supreme Court's reliance upon a theoretically possible misinterpretation of the Tennessee Criminal Code further demonstrates that the law, correctly interpreted, did not render its decision expected and defensible.

In sum, the law in Tennessee was such that the opinion of the Tennessee Supreme Court was constitutionally unexpected and indefensible based on the law that had been expressed in Tennessee. Accordingly, the retroactive application of the decision to abolish the year-and-a-day rule to Petitioner's case violated the Fourteenth Amendment.

ARGUMENT

1. The year-and-a-day rule is a substantive rule of law.

On May 7, 1994, the date James Bowdery was stabbed, the common law year-and-a-day rule was in full force and effect in Tennessee. *See Percer v. State*, 103 S.W. 780 (Tenn. 1907); *Cole v. State*, 512 S.W.2d 598 (Tenn. Crim. App. 1974); *State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999). As conceded by the State of Tennessee in the Tennessee Supreme Court,[2] the year-and-a-day rule was a substantive principle of Tennessee law.[3] In *Percer v. State*, *supra*, at

[2] *See State v. Rogers*, 992 S.W.2d 393, 399 (Tenn. 1999).

[3] *See also United States v. Chase*, 18 F.3d 1166 (4th Cir. 1994) (finding the common law rule to be a substantive rule of law). *Chase* relied heavily upon *Ball v. United States*, 140 U.S. 118

782, the Tennessee Supreme Court, quoted with approval WHARTON ON HOMICIDE (3d ed.), p. 18, which said of the common law rule: "In murder, the death must be proven to have taken place within a year and a day from the date of the injury received." In *State v. Rogers, supra,* at 396, the Tennessee Supreme Court cited this same quote for the proposition that it had recognized "the viability of the rule in Tennessee" since 1907. Thus, as interpreted by the Tennessee Supreme Court, the common law year-and-a-day rule dealt with an essential element of the proof which the prosecution was required to prove.

2. General ex post facto principles prohibit the retroactive abolition of the year-and-a-day rule if accomplished by an act of the Tennessee legislature.

Article I, § 10 of the United States Constitution forbids the passage of an ex post facto law by any state. Two elements must be present for a criminal law to be ex post facto: "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham,* 450 U.S. 24, 29 (1981). An ex post facto law within the meaning of the federal constitution has been defined as:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done; criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d.

(1891) ("The controlling *element* which distinguished the guilt of the assailant from a common assault was the death within a year and a day.") (emphasis added).

> Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648 (1798), cited in *Carmell v. Texas,* ___ U.S. ___, 120 S.Ct. 1620, 1627 (2000).

Petitioner submits that all four types of ex post facto laws described in *Calder* would have been involved if the Tennessee Legislature had passed a law in 1999 amending the Tennessee Criminal Code to eliminate the year-and-a-day rule as a requirement of homicide and that law had been applied retrospectively to Petitioner's case.

The first category has been broadly interpreted by this Court to include situations where a legislature changes or eliminates an element or ingredient of an offense.[4] Under the Ex Post Facto Clause states "may not retroactively alter the definition of crimes," *Collins v. Youngblood,* 497 U.S. 37, 43 (1990), nor may they "change the ingredients of the offense or the ultimate facts necessary to establish guilt." *Hopt v. Territory of Utah,* 110 U.S.

[4] *See Carmell v. Texas,* 120 S.Ct. 1620, 1631 (2000) (the fact that the statute did not change the elements of the offense simply demonstrates that it did not fit within the first category); *see also id.* at 1632-33 (comparing the fourth category with something as unfair as "retrospectively eliminating an element of the offense"); *id.* at 1651 (Ginsburg, J., dissenting) (the fact that "[l]egislatures may not retroactively alter the definition of crimes" noted as an example of the first category, but not the fourth).

574, 589-590 (1884). An ex post facto law has also been defined as a law "which deprives one charged with a crime of any defense available according to law at the time when the act was committed." *Collins*, 497 U.S. 37, 42 (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-170 (1925)). Hence, the retrospective application of a new statute eliminating the year-and-a-day rule to Petitioner's case would have violated the first *Calder* category, as it has been interpreted by this Court.

The second *Calder* category would also have been involved in that elimination of the rule five years after the assault would have aggravated the offense and made it greater than it was when committed and greater than it was when the year had expired. After the year-and-a-day passed without the death of the victim, an act of the legislature to retrospectively eliminate the rule would have aggravated the offense from a lesser offense to a homicide. *Cf. State v. Gabehart*, 836 P.2d 102, 105 (N.M. 1992); *State v. Pine*, 524 A.2d 1104, 1107 (R.I. 1987); *State v. Young*, 390 A.2d 556 (N.J. 1978) (all three cases found that retroactive judicial abolishment of year-and-a-day rule would aggravate the offense).

A legislative act retroactively eliminating the rule would also have been a retroactive increase in punishment from that which was authorized at the expiration of the year-and-a-day for assault to that which would be authorized for homicide. *Cf. People v. Stevenson*, 331 N.W.2d 143, 148 (Mich. 1982) (finding court's retroactive abolishment of year-and-a-day rule would increase the authorized penalty).

Finally, such legislation would also involve the fourth *Calder* category. Eliminating the need for the prosecution to prove that the death occurred within a year-and-a-day would lessen the proof required to be presented by the prosecution. *Cf. State v. Vance*, 403 S.E.2d 495, 501 (N.C. 1991) (retroactively eliminating year-and-a-day rule would permit conviction of defendant on "less evidence").

Without question, if the Tennessee Legislature had passed legislation abolishing the year-and-a-day rule after Petitioner's act, any application of the new law to his case would have violated the Ex Post Facto Clause of the United States Constitution.

3. The purposes behind the prohibition on ex post facto laws are so fundamental that Due Process prevents the Tennessee Supreme Court from obtaining the same result by judicial decree.

The Ex Post Facto Clause contained in Article I, § 10 of the United States Constitution is a limitation on the power of state legislatures and does not of its own force apply to judicial rulings. *Marks v. United States*, 430 U.S. 188 (1977); *Frank v. Magnum*, 237 U.S. 309 (1915). Nevertheless, this Court has held that general ex post facto principles are applicable to judicial rulings through the Due Process Clause of the Fourteenth Amendment. More specifically, this Court has held that the Due Process Clause of the Fourteenth Amendment bars retroactive application of judicial rulings in criminal cases that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue."

See Bouie v. City of Columbia, 378 U.S. 347, 353-354 (1964), and *Marks v. United States*, 430 U.S. 188, 191-192 (1977). This Court reasoned that if a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State's highest court is also barred by the Due Process Clause from achieving precisely the same result by judicial decree. *Bouie*, 378 U.S. at 353-354. The Court stated that: "The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures." *Id.* at 354 (citation omitted). In evaluating whether the retroactive application of a judicial decree violates Due Process, a critical question is whether the Constitution would prohibit the same result attained by the exercise of the state's legislative power. *Id.* at 355. Under authority of *Bouie*, Due Process prevents the Tennessee Supreme Court from retroactively applying its abrogation of the year-and-a-day rule to Petitioner's case if it was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Id.* at 353-354.

In addition to relying on the specific authority of *Bouie*, Petitioner contends that the purposes behind the prohibition on ex post facto laws are so fundamental that Due Process prevents the Tennessee Supreme Court from obtaining the same result by judicial decree.

The principal interests that the Ex Post Facto Clause is designed to serve include (a) fundamental fairness, (b) the notion that citizens be given fair warning of the law, and (c) the prevention of arbitrary and vindictive laws.

See Carmell v. Texas, ___ U.S. ___, 120 S.Ct. 1620, 1631-33, 1650 (2000).

This Court has recognized that fundamental fairness issues apply to all four *Calder* categories:

> All of these legislative changes, in a sense, are mirror images of one another. In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life. *Carmell*, 120 S.Ct. at 1633.

Ex post facto laws violate notions of fundamental fairness because they "are oppressive, unjust, and tyrannical; and, as such, are condemned by the universal sentence of civilized man." *Id.*[5] Furthermore, ex post facto laws violate notions of fundamental fairness even when there is no notice or reliance interests involved. *Id.* at 1631-32 n. 16.

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[5] *See also, Kaiser Aluminum v. Bonjorno*, 494 U.S. 827, 855-56 (1990) (Scalia, J. concurring) ("The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. . . . Justice Story said that 'retrospective laws are . . . generally unjust. . . . The presumption of nonretroactivity, in short, gives effect to enduring notions of what is fair.").

With regard to fair warning, this Court has not confined the concept to simply warning of those acts which are deemed criminal. *See Weaver v. Graham*, 450 U.S. 24 (1980) (statute reducing good-time credit for offense committed before its effective date violated ex post facto). "Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Landgraf v. USI Film Products*, 511 U.S. 244, 282, n. 35 (1994) (citing *Weaver v. Graham*, 450 U.S. at 28-30). Accordingly, this Court has concluded that legislative enactments must do more than give fair warning of what conduct is criminal, they must give "fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Carmell*, 120 S.Ct. at 1632, n.21.

Ex post facto principles prevent legislatures from arbitrarily and vindictively singling out individuals for criminal sanctions in response to news that they have committed a serious act of offensive behavior. In such cases, political pressure from voters or constituents may cause legislators to wish to punish offensive behavior that otherwise would escape punishment or would receive a lesser punishment based on existing statutes. The prohibition against ex post facto laws minimizes the possibility that legislators may use the criminal law to target identifiable individuals based on their prior conduct.

Each of the three purposes that the Ex Post Facto Clause is designed to serve, i.e., fundamental justice, fair warning, and the prevention of arbitrary and vindictive laws, are implicated in the present case. The Tennessee

Supreme Court waited until it had a live defendant in front of it in 1999 to determine what law would govern the defendant's 1994 act. By announcing a change in substantive law, rather than interpreting existing law, the Tennessee Supreme Court's decision below raises the very concerns for arbitrariness and vindictiveness that animate the ex post facto limitation on legislative power. *Cf. People v. Stevenson*, 331 N.W.2d 143, 148-149 (Mich. 1982). It was fundamentally unfair to eliminate the requirement that the prosecution prove the death of the victim within a year-and-a-day of the assault and retroactively apply its ruling to an assault that had occurred five years earlier. When the year expired and the victim was still alive, the State was barred from ever establishing a homicide if the victim died in the future. This was the law in effect when the assault occurred and when the year had passed without the victim's death. To abolish the rule five years later would be "fundamentally unjust" and "fundamentally unfair in a jurisdiction devoted to the rule of law." *State v. Young*, 390 A.2d 556, 560 (N.J. 1978). Likewise, although Petitioner was on notice that his conduct was criminal at the time of the act, he was entitled to rely upon the applicability of the year-and-a-day rule to bar a homicide prosecution if the victim did not die within the required period. *Cf. People v. Stevenson*, 331 N.W.2d 143, 148 (Mich. 1982). Furthermore, reliance on the rule would be naturally heightened after the victim slipped into a coma and Petitioner was charged with attempted murder, and even further heightened when the year passed without the victim's death.

The principles on which the Ex Post Facto Clause is based, i.e., fundamental justice, fair warning, and the prevention of arbitrary and vindictive laws, are core concepts of constitutional liberty. *Cf. Marks v. United States*, 430 U.S. 188, 191 (1977) (principle of fair warning is fundamental to concept of constitutional liberty); *Rubino v. Lynaugh*, 845 F.2d 1266, 1273 (5th Cir. 1988) ("ban on ex post facto legislative or judicial action does more than ensure fair warning; it also curbs vindictiveness"). As such, the Due Process Clause of the Fourteenth Amendment prevents courts from applying judicial rulings in ways which impinge upon these same principles. Where ex post facto laws are by their nature fundamentally unfair when enacted by a legislature, they are likewise "fundamentally unfair" as the result of judicial rulings. Whether the governmental actor responsible for the unfair law is a legislature or a court is irrelevant. The same can be said for the prevention of arbitrary and vindictive laws. State supreme courts which are politically accountable to the electorate may be susceptible to the same kind of influences which justify the ex post facto limitations placed on legislatures.

The law applicable to evaluating challenges under the Ex Post Facto Clause is equally applicable to a determination of whether retroactive application of a judicial decree violates the Due Process Clause.[6] This is especially

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[6] As will be discussed more fully in the next section, this Court held in *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964), that "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." The notion that court decisions may be applied retroactively without violating Due Process is premised on the idea that if a court decision is expected and defensible by reference to law which has been expressed prior to the conduct in issue, the purpose of fair warning is not implicated and the likelihood that the ruling is the result of vindictive and arbitrary action is lessened. On the other hand, if the ruling is unexpected and indefensible by reference to the law, the defendant has been denied fair warning and the likelihood that the ruling is arbitrary and vindictive is increased.

true when a court is not "interpreting" the law, but is, in fact, engaged in the process of judicial "legislation." As early as 1907, the Tennessee Supreme Court recognized the year-and-a-day rule as a substantive requirement of Tennessee law. *See Percer v. State*, 103 S.W. 780 (Tenn. 1907). In Petitioner's case the Tennessee Supreme Court recognized that this rule "has in fact never been a part of the statutory law of [Tennessee]" and that the existence of the rule was unaffected by the Tennessee Criminal Code of 1989. *State v. Rogers*, 992 S.W.2d 393, 400 (Tenn. 1999). Hence, when the Tennessee Supreme Court "abolished" the rule, *id.* at 401, it did so not upon the interpretation or construction of a statutory provision. Nor was the rule abolished based upon the interpretation or construction of prior judicial opinion. Prior judicial precedent clearly recognized the year-and-a-day rule in Tennessee. Rather, the Tennessee Supreme Court abolished the rule merely because of its determination that the reasons originally supporting it no longer existed. *Id.*

Accordingly, when the Tennessee Supreme Court "abolished" the existing substantive rule of law which required the prosecution to establish the death of the

victim within a year-and-a-day of the assault, it assumed a legislative capacity.

Existing statutory and case law did not support the abolishment of the substantive rule of law. Hence, the Court was not "interpreting" or "construing" existing law, but was acting as a legislative body. Petitioner submits that the Due Process Clause prevents a court acting in a legislative capacity from accomplishing what legislatures are prohibited from doing under the Ex Post Facto Clause. *Bouie*, 378 U.S. at 353-354.

4. The abolishment of the year-and-a-day rule was unexpected and indefensible by reference to the law which had been expressed at the time of Petitioner's conduct.

A. Introduction

In *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (citing Hall, General Principles Of Criminal Law (2d ed. 1960) at 61), this Court held that "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect."

In the present case, the Tennessee Supreme Court recognized the general prohibition against retroactive application of judicial decisions. However, it reasoned that retroactive application of the decision to abrogate the rule did not violate Due Process because it was not an unexpected and unforseen judicial construction. It stated:

> Given the fact that the rule has been abolished by every court [referring to other states] which has squarely faced the issue, and given the fact that the validity of the rule has been questioned in this State in light of the passage of the 1989 Act, we conclude that our decision abrogating the rule is not an unexpected and unforeseen judicial construction of a principle of criminal law.

Rogers, 992 S.W.2d at 402.

The Tennessee Supreme Court erred by applying its decision retroactively as the abrogation of the year-and-a-day rule was unexpected and indefensible by reference to the law expressed before Petitioner's acts.

B. General principles

Whether the decision of the Tennessee Supreme Court to overturn prior precedent and abolish the rule was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue" is a question of federal law subject to this Court's independent determination. *Cf. Moore v. Wyrick*, 766 F.2d 1253, 1255 (8th Cir. 1985); *Weaver v. Graham*, 450 U.S. 24, 33 (1981) (ex post facto law claim is one of federal law).

The proper standard or frame of reference used to determine whether the Tennessee Supreme Court's ruling was unexpected and indefensible is that of a person of ordinary intelligence. *Bouie*, 378 U.S. at 351; *Johnson v. State*, 472 A.2d 1311, 1316 (Del. 1983) (common intelligence). To apply such a standard a legal fiction is employed whereby a person of ordinary intelligence is

under a duty to ascertain the state law, including established rules of judicial construction, which might be applicable to his or her conduct. *United States v. Anderson*, 356 F.Supp. 445 (D.C. Del. 1973). The subjective expectation of a particular defendant is irrelevant. *Bouie*, 378 U.S. at 355 n. 5.

C. At the time of Petitioner's acts the year-and-a-day rule was recognized as a viable part of Tennessee law.

As the Tennessee Supreme Court recognized in the present case, the year-and-a-day rule is deeply rooted in the common law. As early as 1894, this Court held that common law murder undoubtedly included the year-and-a-day rule and that "such is the rule in this country in prosecutions for murder, except in jurisdictions where it may be otherwise prescribed by statute." *Louisville, Evansville, & St. Louis R.R. Co. v. Clarke*, 152 U.S. 230, 239 (1894). Tennessee is a common law state which, in its Constitution of 1796, adopted the common law of England as it stood in 1776. Further, that common law prevails in Tennessee unless and until specifically changed by statute. *See State v. Alley*, 594 S.W.2d 381, 382 (Tenn. 1980). As such, the year-and-a-day rule would have been part of the body of Tennessee common law even if the Tennessee Supreme Court had remained mute concerning the rule. Instead, it specifically recognized its existence in *Percer v. State*, 103 S.W. 780 (Tenn. 1907), as did the Tennessee Court of Criminal Appeals in *Cole v. State*, 512

S.W.2d 598 (Tenn. Crim. App. 1974).[7] Further, no Tennessee decision had ever called the year-and-a-day rule into question until after Petitioner's act. The citizens of a state should be able to rely upon the last opinion of its highest court and the overruling of long established precedent, while always "possible," is unforeseeable for due process purposes. *See Devine v. New Mexico Dep't of Corrections*, 866 F.2d 339, 345 (10th Cir. 1989) (citing *Marks v. United States*, 430 U.S. 188, 192-196 (1977)); *People v. Farley*, 53 Cal. Rptr. 2d 702, 710 (1996) ("whether existing judicial precedent will be overruled is a matter of speculation and conjecture").

D. The omission of a specific reference to the year-and-a-day rule in the Tennessee Criminal Code of 1989 would not give a reasonable person sufficient constitutional notice that the year-and-a-day rule was in question in Tennessee.

In the Tennessee Supreme Court, the prosecution abandoned its contention that the year-and-a-day rule was a defense, but argued that the rule had been abrogated because it was not included in the definition of criminal homicide found in the Tennessee Criminal Code of 1989. The 1989 Code defined criminal homicide as "the unlawful killing of another person which may be first

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[7] Both cases are cited in West's TENNESSEE DIGEST 2d, Vol. 17, *Homicide* § 6 (1986). Likewise, the year-and-a-day rule is mentioned in 14 TENN. JURIS., *Homicide*, § 4, p. 171 n.1 (1984), citing *Cole v. State*, 512 S.W. 2d 598 (Tenn. Crim. App. 1974). The rule was not an obscure point of law, but a well recognized principle of homicide law.

degree murder, second degree murder, voluntary manslaughter, criminally negligent homicide or vehicular homicide." TENN. CODE ANN. § 39-13-201. The State reasoned that the rule had been abolished by the failure of the legislature to specifically include it in the statutory definition of homicide.

To support its argument, the State cited provisions of the Criminal Code which expressed the desire of the Tennessee legislature to replace all common law offenses with statutory offenses, *see* TENN. CODE ANN. § 39-11-102(a), and its stated objective to "give fair warning of what conduct is prohibited, and guide the exercise of official discretion in law enforcement, by defining the act and culpable mental state which together constitute the offense." TENN. CODE ANN. § 39-11-101(2). Petitioner submits that these additional provisions of the Criminal Code bear no relationship to the year-and-a-day rule as it is not a "common law offense" and has no bearing upon either the actus reus or mens rea of a criminal offense.

The Tennessee Supreme Court rejected the State's argument and concluded that the year-and-a-day rule was unaffected by its omission from the 1989 Criminal Code. *Rogers*, 992 S.W.2d at 400. Nevertheless, the State will, in all likelihood, argue in this Court that the failure to include the rule in the 1989 codification was sufficient constitutional notice that the viability of the year-and-a-day rule was in question in Tennessee. Petitioner submits that the mere omission of a specific reference to the common law rule in the 1989 Criminal Code cannot constitute sufficient constitutional notice that the rule was in question.

As noted in the preceding subsection, the rule was a part of the common law of Tennessee. Further, it was specifically recognized as a requirement of the law by the Tennessee Supreme Court in 1907. *Percer v. State*, 103 S.W. 780 (Tenn. 1907). Although long acknowledged as a rule of law, it has never been codified in any Tennessee statute or code. The lack of specific reference to the rule in the 1989 Criminal Code simply continued long-standing Tennessee tradition before and after 1989. Thus, its omission in the Criminal Code could not give notice of the argued problematic viability of the rule.

In addition, it is a general rule of statutory construction that statutes do not alter the common law further than the act expressly declares or than must necessarily be implied from the fact that the act covers the whole subject matter. *State v. Cooper*, 113 S.W. 1048 (Tenn. 1908); *State v. Watkins*, 130 S.W. 839 (Tenn. 1910). *See also United States v. Texas*, 507 U.S. 529 (1993) (presumption that common law principles of law are retained except when a statutory purpose to the contrary is evident; in order to abrogate a common law principle, the statute must "speak directly" to the question addressed by the common law). The 1989 Criminal Code, like all codes before it, contained no provision relating to the year-and-a-day rule. As such, the 1989 Criminal Code could not have reasonably been interpreted as altering the common law rule.

Another rule of statutory construction provides that criminal statutes are to be strictly construed against the State and in favor of a defendant. *State v. Alford*, 970 S.W.2d 944, 947 (Tenn. 1998).

Unlike many criminal codes, the 1989 Criminal Code specifically included provisions approving common law judicial decisions and interpretive rules. The 1989 Code provides that:

> The provisions of this title shall be construed according to the fair import of their terms, including reference to judicial decisions and common law interpretations, to promote justice, and effect the objectives of the criminal code.

TENN. CODE ANN. § 39-11-104.

The Sentencing Commission Comments to TENN. CODE ANN. § 39-11-102 further clarified the legislative intent: "While this revised criminal code supersedes common law offenses, the commission does not intend to abrogate the interpretive rules developed under common law and specifically includes such interpretations under § 39-11-104."

The 1989 Criminal Code omitted any provision in the definition of homicide relating to "causation." Hence, a citizen examining the Code would be left with only two choices – that causation had been eliminated as an element of the offense because it was not found in the codification or that the causation element was governed by the common law rule. The State has conceded the more reasonable interpretation that the common law prevails on the element of causation absent a specific reference in the 1989 Criminal Code.

Based on all of these considerations, the Tennessee Supreme Court rejected the State's contention that the failure to specifically include the common law rule in the

statutory definition of homicide resulted in its abolishment. No reasonable Tennessean would be put on notice that the 1989 codification sans a specific reference to the year-and-a-day rule brought its continued viability into question given: (a) that the rule has never been contained in any criminal code, (b) applicable rules of statutory construction do not support such interpretation, (c) the 1989 Criminal Code's specific reference to and adoption of common law interpretations, and (d) the illogical reasoning necessary to interpret the 1989 Code as having eliminated all common law principles, such as causation.

E. The erroneous ruling by the intermediate appellate court that the year-and-a-day rule had been abolished was rendered after Petitioner's act and could not suffice to put a reasonable person on notice that prior precedent would be reversed.

In reviewing Petitioner's case, the Tennessee Supreme Court rejected any notion that the year-and-a-day rule was affected by the 1989 Criminal Code. However, the Tennessee Supreme Court did conclude that an erroneous opinion of the intermediate appellate court, rendered after Petitioner's assault of Bowdery and which stated, *in dicta*, that the rule had been abolished for a different reason, *State v. Ruane*, 912 S.W.2d 766, 774 (Tenn. Crim. App. 1995), was evidence of "uncertainty surrounding the continuing viability of the rule in light of the passage of the 1989 Act." *Rogers*, 922 S.W.2d at 402.

Significantly, the intermediate appellate court did not find that the rule was in question due to an omission of a specific reference to the rule. Rather, it determined that

the year-and-a-day rule was a "defense" and that the rule had been abolished under the 1989 Code which did away with all common law defenses. *Ruane*, 912 S.W.2d at 774. In the present case, the Tennessee Supreme Court rejected the reasoning of the intermediate appellate court and determined that the year-and-a-day rule was not a "defense," but something more. *Rogers*, 992 S.W.2d at 400. (JA, 23). However, the Tennessee Supreme Court cited the erroneous *Ruane* decision as evidence of uncertainty as to the continued viability of the rule and as justification for the retroactive application of its ruling. *Id.* at 402. (JA, 27-28). The problem with the analysis of the Tennessee Supreme Court is threefold.

First, the opinion of the intermediate appellate court in *State v. Ruane* was rendered on July 14, 1995, more than one year after the act committed in the present case. Petitioner could not logically be put on constitutionally adequate notice of a potential change in the law by an erroneous opinion rendered after his act in the present case.

Second, as of the date of Petitioner's act, his anticipation of a subsequent reversal of the year-and-a-day rule based on the 1989 Criminal Code would require that he either (a) foresee the future erroneous ruling of the intermediate court *and* misinterpret the law by wrongly determining that the rule was nothing more than a defense, or (b) wrongly conclude that the Code's failure to specifically mention the rule had resulted in its abrogation. The Tennessee Supreme Court found as a matter of law that the year-and-a-day rule is not a defense and that the 1989 Criminal Code did not affect the status of the rule in Tennessee. Accordingly, only a misinterpretation of the

existing law would have put one on notice that the 1989 codification might result in a potential reversal of the rule. The 1989 Criminal Code did not, in fact, have any effect on the common law year-and-a-day rule. Petitioner was deemed to know this law and should have been able to rely upon the law as it was, rather than as it could have been misinterpreted.

Such erroneous interpretations of the law are not reasonable. The notion of the year-and-a-day rule as a defense finds no support in the general common law or the common law as expressed in *Percer v. State*. It was always deemed a substantive element of the offense. Likewise, as discussed in the previous subsection, no reasonable person could interpret the failure to specifically refer to the rule in the 1989 Code as an abrogation of the rule.

Third, the Tennessee Supreme Court misjudged the focus of the *Bouie* test. Under *Bouie* the test is whether the overruling of the prior precedent of the Tennessee Supreme Court and its judicial abolishment of the year-and-a-day rule was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie*, 378 U.S. at 354 (citing Hall, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960, at 61)). The test is not whether a misinterpretation of the 1989 Criminal Code might render the viability of the rule in question. At the time of Petitioner's act a clear ruling of the Tennessee Supreme Court recognized the viability of the year-and-a-day rule and a correct interpretation of the 1989 Criminal Code would not support a rejection, abolition or modification of the rule. As such, the overruling of the prior precedent of the Tennessee Supreme Court

and its judicial abrogation of the rule was unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.

F. In light of the Tennessee Supreme Court's specific approval of the year-and-a-day rule in 1907, it was improper to look to the law of other jurisdictions to place that ruling in doubt.

The Tennessee Supreme Court misapprehended the rule of *Bouie* by finding that it could look to the law of other jurisdictions to determine whether its abrogation of the year-and-a-day rule was "unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue."

In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the defendants' trespass convictions were affirmed by the South Carolina Supreme Court based upon its retroactive application of an interpretation of a trespass statute to include the act of remaining after receiving notice to leave the premises. The pertinent statute made it a criminal offense to *enter* another's premises after receiving notice that entry was prohibited. Quoting Hall, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960, at 61), this Court stated, "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." *Bouie* at 378 U.S. 354. In determining whether the state court's construction of the criminal statute was so unforeseeable as to deprive the defendant of fair warning, this Court focused primarily on the prior decisional law of South Carolina. Looking

at such prior law, this Court concluded that the new interpretation of the statute to include remaining on premises "has not the slightest support in prior South Carolina decisions." *Id.* at 356. Accordingly, the Court concluded that the pre-existing South Carolina law gave the defendants no warning of the judicial construction of the statute.

With regard to whether the law of other states could be consulted this Court said: "It would be a rare situation in which the meaning of a statute of another State sufficed to afford a person 'fair warning' that his own State's statute meant something quite different from what its words said." *Id.* at 359-360. Petitioner submits that decisions from another state cannot give a defendant notice that an unequivocal ruling from his own State's highest court is in question. *See, e.g., Moore v. Wyrick*, 766 F.2d 1253, 1258 (8th Cir. 1985) ("[I]n light of prior unquestioned Missouri authority directly on point, it cannot reasonably be argued that cases from other jurisdictions supply the fair warning that is constitutionally required by the due process clause.); *Bouie*, 378 U.S. at 359-60, 84 S.Ct. at 1705-06."); *Lopez v. McCotter*, 875 F.2d 273, 277-78 (10th Cir. 1989) (the decisional precedents of other states could not have afforded defendant fair warning).

The *Bouie* test focuses upon prior judicial decisions of the state of defendant's offense, not other states. Petitioner submits that Tennessee citizens are not duty-bound to know the law in all fifty states.[8] Thus, a change in the

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[8] A reasonabie citizen searching the law would find a significant number of jurisdictions continue to follow the year-

law of another state cannot provide the foundation of "fair warning" to a Tennessee citizen as to the substance of Tennessee law.

A consideration of prior Tennessee decisions clearly established the year-and-a-day rule as Tennessee law. *Percer v. State*, 103 S.W. 780 (Tenn. 1907); *Cole v. State*, 512 S.W.2d 598 (Tenn. Crim. App. 1974). As of the date of Petitioner's act, no Tennessee decision had ever called the year-and-a-day rule into question. The lack of specific reference to the rule in the Tennessee Criminal Code of 1989, like all prior Tennessee codes, had no effect upon the rule's viability as ultimately held by the Tennessee Supreme Court in Petitioner's case. As such, Tennessee law as it "had been expressed prior to the conduct in issue" offers neither the slightest support for abrogation of the year-and-a-day rule nor the required "fair warning" to Petitioner that the rule was under question at the time of his offense.

5. The majority of jurisdictions that have considered the present issue have determined that retroactive judicial abrogation of the year-and-a-day rule would violate Due Process.

In *State v. Vance*, 403 S.E.2d 495, 501 (N.C. 1991), the North Carolina Supreme Court, citing *Bouie*, refused to apply its decision to abrogate the common law year-and-a-day rule retroactively finding that it would permit the

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and-a-day rule. *Homicide – Time Between Injury and Death*, 60 ALR3d 1223 (1974); *State v. Minster*, 302 Md. 240, 486 A.2d 1197, 1200, n.5 (1985).

conviction of the defendant upon "less evidence" than would have been required at the time the victim died.

In *State v. Pine*, 524 A.2d 1104, 1107 (R.I. 1987), the Rhode Island Supreme Court, citing *Bouie*, declined to retroactively apply its decision to do away with the common law year-and-a-day rule. The Court reasoned that retroactive application of the rule "would 'aggravate' the crime of assault and battery, making it greater than it was when committed or greater than it could have been before the expiration of the year and a day."

In *People v. Stevenson*, 331 N.W.2d 143, 148 (Mich. 1982), the Michigan Supreme Court, citing *Bouie*, refused to retroactively apply its decision to abolish the common law year-and-a-day rule. In reaching its decision, the Court, among other things, rejected prosecution arguments that the defendant had fair notice that his conduct was criminal and that the defendant did not actually rely upon the year-and-a-day rule at the time of the assault. In addressing the prosecution's fair notice argument, the Court first noted that fair notice is not the sole purpose of the Ex Post Facto Clause. It also protects against retroactive increases in punishment. The Court stated:

> A murderer has fair notice that his conduct is criminal, yet this Court would not approve a retroactive increase in the authorized punishment. . . . In this case, abolishing the rule retroactively would permit a possible increase in the maximum authorized punishment from life (assault with intent to rob while armed) to mandatory life without the possibility of parole (first-degree murder). Increasing the authorized penalty after the fact does not deny the defendant fair notice of what conduct is criminal, yet

> it still violates the rule against ex post facto criminal laws. Abrogating the year and a day rule in this case would apply this opinion to events occurring before it and would clearly disadvantage the defendant unfairly.

Stevenson, 331 N.W.2d at 148.

The Court also rejected the prosecution argument that the Constitution only prohibited criminalizing an act which was legal when done. The *Stevenson* Court said:

> The prosecutor's view that the Ex Post Facto Clause only prohibits making illegal what was legal when done is far too narrow. Under the prosecutor's analysis, the Legislature or this Court could retroactively redefine murder to include those cases in which the victim was critically injured, but fully recovered. The retroactive elimination of the requirement that the victim actually die would be justified by the rationale that the defendant did not lack fair warning that his conduct was illegal.

Id. at 149.

In dispatching the "actual reliance" argument of the prosecution, the Court said:

> Arguably, the defendant could have relied on the year and a day rule, not in expecting that the victim would survive that long, but reasonably expecting that if the victim did in fact survive that long, a murder conviction could not result. However, actual reliance or even fictional reliance is not the sole interest protected by due process. The ex post facto principle also protects against erratic or arbitrary action improper in a lawgiver. It would be nothing if not erratic to declare for the first time today, almost five years after the year and a day rule effectively barred a murder prosecution in this case, that such a prosecution could be maintained. The defendant's subjective intent or reliance is simply not controlling in this case. A defendant may not even be aware of various important evidentiary rules or the maximum punishment at the time of the offense, and yet such protections may not be abolished retroactively. *Id.* at 148-149 (citations omitted).

In *State v. Young*, 390 A.2d 556 (N.J. 1978), the New Jersey Supreme Court, citing *Bouie*, also refused to give retroactive effect to its decision to abolish the common law year-and-a-day rule finding that to do so would be "fundamentally unjust" and "fundamentally unfair in a jurisdiction devoted to the rule of law." *Id.* at 560. The Court noted that the *Bouie* reasoning applied, despite defendant's criminal conduct, because *Bouie* indicated that its principles applied when a judicial decision aggravates a crime, or makes it greater than it was when committed. *Id.* (citing *Bouie*, 378 U.S. at 353-354). The New Jersey Supreme Court also rejected the prosecution argument that there had been no actual reliance upon the rule by the defendant at the time of the assault:

> Actual reliance by a defendant on the preexisting state of the criminal law is not a prerequisite to invocation of the principle under consideration. While foreseeability of consequences and fair warning to the public are sometimes considered part of the philosophical basis for the Ex post facto and related due process principles, those principles are operative entirely without regard to whether the defendant in the particular case actually relied on the prior state of the

criminal law at the time of the conduct in question. *Young*, 390 A.2d at 560-561 (citation omitted).

In *United States v. Jackson*, 528 A.2d 1211 (D.C. App. 1987), the District of Columbia Court of Appeals, also citing *Bouie*, refused to retroactively apply its judicial abolition of the common law year-and-a-day rule. Although not viewing the situation as falling within the fair notice or increased punishment categories, the Court reasoned that abrogation of the rule would deprive the defendant "of a substantial right, or more accurately of a plea that would bar prosecution, which was available to him at the time" he assaulted the victim. *Id.* at 1223-1224.

In *Commonwealth v. Lewis*, 409 N.E.2d 771 (Mass. 1980), the Supreme Judicial Court of Massachusetts, also citing *Bouie*, refused to retroactively apply its decision to reject the common law year-and-a-day rule.

In *State v. Gabehart*, 836 P.2d 102, 105 (N.M. 1992), the Supreme Court of New Mexico refused to retroactively apply its decision to abrogate the common law year-and-a-day rule. The Court reasoned that to do so would aggravate a crime from a lesser offense to a homicide.

The Tennessee Supreme Court cited authorities from three other states as supporting the decision to apply its abrogation of the year-and-a-day rule retroactively. *People v. Snipe*, 192 Cal. Rptr. 6 (Ca. Ct. App. 1972); *Commonwealth v. Ladd*, 166 A.2d 501 (Pa. 1960), and *State v. Sandridge*, 365 N.E.2d 898 (Ohio Ct. C.P. 1977). Petitioner submits that these three authorities pale in comparison to those cited above which found such retroactive application to violate ex post facto and due process concerns.

Significantly, *Ladd* predated *Bouie* and both the *Snipe* and *Ladd* decisions involve jurisdictions where the year-and-a-day rule was considered nothing more than a rule of evidence rather than a substantive rule of law.[9] The State conceded in the present case that the Tennessee rule is a substantive rule of law. Additionally, in *Snipe* the legislature changed the year-and-a-day rule before the year had expired. The *Snipe* Court placed great weight upon the fact that the law changed before the right to the rule had vested. Finally, *Sandridge* involves only a trial court opinion in which ex post facto concerns were not considered nor mentioned.

Thus, all jurisdictions which consider the year-and-a-day rule as a substantive rule of law and which have considered whether judicial abrogation of the common law year-and-a-day rule could be applied retroactively have concluded that the constitutional principles enunciated in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), prevent retroactive application of the change in the law.

CONCLUSION

The opinion and judgment of the Supreme Court of Tennessee should be reversed. Retroactive application of the judicial abolishment of the year-and-a-day rule to Petitioner violates the Fourteenth Amendment of the United States Constitution. Accordingly, this case should

[9] The *Snipe* and *Ladd* Courts obviously labored under the misconception that all rules of evidence could be changed without violating Ex Post Facto and Due Process principles.

be remanded to the Supreme Court of Tennessee for a determination as to whether Petitioner's sentence may be modified to a lesser offense or whether a new trial is required.

Respectfully submitted,

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In The

Supreme Court of the United States

WILBERT K. ROGERS,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Tennessee

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QUESTION PRESENTED

Whether the Tennessee Supreme Court's retroactive application of its decision abolishing the common law year-and-a-day rule to petitioner's case denied him due process of law in violation of the Fourteenth Amendment.

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STATEMENT OF THE CASE

1. Following a jury trial in the Criminal Court of Shelby County, Tennessee, petitioner Wilbert Rogers was convicted of the second degree murder of Ira James Bowdery, in violation of Tenn. Code Ann. § 39-13-210(a)(1) (1991).[1] He was sentenced to 33 years' imprisonment. R. Vol. I, 34-38.

The evidence at trial showed that, on the night of May 7, 1994, Bowdery was asleep with his girlfriend, Lisa Sledge, in her bedroom, when Rogers entered the room and attacked Bowdery with a butcher knife. The three had been playing cards and drinking beer at Sledge's Memphis apartment earlier that evening. R. Vol. II, 15-17; 40-41. Bowdery and Sledge left Rogers sleeping in the living room when they went upstairs to bed. R. Vol. II, 17-19. According to Sledge, she awoke to the noise of someone jiggling the knob of her bedroom door. R. Vol. II, 20. Thinking that Rogers had probably come upstairs in search of the bathroom, she got up to open the door. *Id.* Rogers, wielding a butcher knife taken from Sledge's kitchen, immediately pushed her aside, said, "Where's

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[1] The statute provides, in pertinent part, that "[s]econd degree murder is . . . [a] knowing killing of another." The mens rea of "knowing"

> refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

Tenn. Code Ann. § 39-11-302(b) (1991).

that nigger at" and "Where's my money at," and "went for" Bowdery with the knife. *Id.* Sledge saw Rogers stab Bowdery and then "a lot of blood." Bowdery was bleeding from his hands, his chest, and his stomach. R. Vol. II, 22-23.

Sledge ran screaming from her apartment to a telephone on the corner and dialed 911. R. Vol. II, 23-25. She saw Rogers leaving the scene. R. Vol. II, 24-25. Meanwhile, Bowdery, bleeding and unclothed, staggered to the nearby home of his friends, Jimmy and Dianna Reed, and banged on the front door. R. Vol. II, 75-77. After Mrs. Reed let him in, Bowdery told her twice, "He stabbed me," and then collapsed on the couch in the living room. R. Vol. II, 76-77. The Reeds called an ambulance. R. Vol. II, 77-78.

Rogers later boasted about the attack to two coworkers that he "went in the kitchen and got two butcher knives and went upstairs like Jason, and stabbed this dude." He explained that he did it because, when he awoke that evening, he discovered he was missing 13 or 14 dollars. R. Vol. II, 68; 93-94.

Bowdery survived in a vegetative state until August 1995, when he contracted a kidney infection as a complication of his condition and died. R. Vol. II, 139; 142. Dr. Jerry Francisco, the Shelby County Medical Examiner, testified that Bowdery went into cardiac arrest as a result of a stab wound to the heart and that, before doctors could restart his heart and reestablish circulation, Bowdery developed hypoxia of the brain, with the result that "the higher brain functions no longer existed." R. Vol. II, 138-39. The cause of death was "cerebral hypoxia, which

means loss of oxygen to the brain . . . secondary to a stab wound to the heart." R. Vol. II, 140.

2. On appeal, Rogers claimed for the first time that the common law year-and-a-day rule precluded his conviction for murder because his victim had survived more than a year and one day after the brutal stabbing that caused his death. A panel of the Tennessee Court of Criminal Appeals unanimously affirmed the conviction. Following prior case law of that court,[2] the panel characterized the year-and-a-day rule as a common law defense and determined that all common law defenses in Tennessee had been abolished by the Criminal Sentencing Reform Act of 1989, specifically Tenn. Code Ann. § 39-11-203(e)(2) (1997).[3] J.A. 9. Accordingly, the panel concluded that "the 'year-and-a-day' rule defense is no longer viable in Tennessee." *Id.* Noting that Rogers committed his crime five years after the enactment of this legislation, the panel also rejected Rogers' claim that the abolition of the rule created an ex post facto violation in his case. *Id.*

3. Although employing a different rationale, the Tennessee Supreme Court also unanimously affirmed the conviction. The court first reviewed the historical development of the year-and-a-day rule at common law, both in England and this country, and listed the three most frequently cited justifications for the rule:

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[2] *State v. Ruane*, 912 S.W.2d 766, 774 (Tenn. Crim. App. 1995).

[3] "Defenses available under common law are hereby abolished."

> The first and most often cited justification is that thirteenth century medical science was incapable of establishing causation beyond a reasonable doubt when a great deal of time had elapsed between the injury to the victim and the victim's death. Therefore, it was presumed that a death which occurred more than a year and one day from the assault or injury was due to natural causes rather than criminal conduct.
>
> Second, it has often been said that the rule arose from the early function of the jury as a reporter of the happenings of the vicinage. Even if expert medical testimony had been adequate to establish causation at common law, it would not have been admissible. Unlike current procedure, in early English courts, jurors were required to rely upon their own knowledge to reach a verdict, and they could not rely upon the testimony of witnesses having personal knowledge of the facts or upon expert opinion testimony.
>
> Finally, the rule has occasionally been characterized as an attempt to ameliorate the harshness of the common law practice of indiscriminately imposing the death penalty for all homicides – first degree murder and manslaughter alike.

J.A. 16-17 (citations omitted).

The court next surveyed the modern case law of other states and learned that "the rule has fallen into disfavor and has been legislatively or judicially abrogated by the vast majority of jurisdictions which have recently considered the issue" (J.A. 17-21), principally because modern medicine now makes possible a scientifically reliable determination of the cause of a victim's death,

regardless of the amount of time that has passed since his or her injury at the hands of the perpetrator. The court also determined from these decisions that the rule's demise in other jurisdictions, whether by legislative or judicial action, "has not altered the general principle that causation be proven beyond a reasonable doubt." J.A. 21. The abolition of the rule's "arbitrary time limit" after which a murder prosecution is barred "simply allows the State to have the opportunity to attempt to prove causation." *Id.*

Turning to the status of the rule under Tennessee law, the court disagreed with the intermediate appellate court's conclusion that the rule was a common law defense and had therefore been abrogated by the provisions of the 1989 Criminal Sentencing Reform Act abolishing all such defenses in the state. "While similar in some respects to a defense in the sense that it precludes a conviction," the court observed, "the year-and-a-day rule is even more powerful than a defense because it entirely precludes a murder prosecution." J.A. 23. The court likewise rejected the State's position that the 1989 Act should be deemed to have abrogated the rule because the legislature omitted any reference to it when defining the elements of criminal homicide. In so doing, the court relied upon the provisions of the 1989 Act directing that common law judicial decisions and interpretive rules be consulted when applying the Act, as well as upon canons of statutory construction requiring that statutes in derogation of the common law be strictly construed and that criminal statutes be construed against the State and in favor of the defendant. J.A. 23-24.

Having thus concluded that the year-and-a-day rule was not abolished by the legislature's comprehensive revision of Tennessee's criminal code in 1989, the court next considered whether and how the rule should be modified. Recognizing a "special duty" to reevaluate "obsolete common law doctrines" when "it is the Court, rather than the Legislature, which has recognized and nurtured the common law rule," the court believed judicial reconsideration "particularly appropriate" in this instance. J.A. 24 (internal quotation marks and citations omitted). In the court's view, it was unnecessary to leave the matter to the legislature, because "the year-and-a-day rule . . . has in fact never been a part of the statutory law of" Tennessee. *Id.*

Since "the reasons which prompted common law courts to recognize the rule no longer exist" (*id.*), the court declared the year-and-a-day rule abolished in Tennessee. Causation in homicide cases can now be accurately assigned, thanks to advances in medical science; modern evidentiary rules now permit juries to consider the opinions of experts on such issues; and the death penalty is now reserved only for cases of first degree murder under comprehensive substantive and procedural limitations. J.A. 24-25. The court also refused to adopt "a substitute time limit" to replace the rule. "[N]o arbitrary time frame is needed," the court decided, "because abolition . . . does not relieve the State of its burden of proving causation beyond a reasonable doubt," a safeguard deemed "sufficient to satisfy due process." J.A. 25-26.

The court applied its decision abolishing the year-and-a-day rule to Rogers' case and affirmed his conviction. Overruling Rogers' objection that to do so would

violate the Ex Post Facto Clauses of the United States and Tennessee Constitutions, the court initially noted that "both the federal and state constitutional provisions [prohibiting ex post facto laws] refer only to legislative acts," not judicial decisions. J.A. 27. Accordingly, the court addressed Rogers' claim under this Court's decisions in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and *Marks v. United States*, 430 U.S. 188 (1977), to determine whether retrospective application of its abolition of the rule in Rogers' case would offend the due process guarantees of the Fifth and Fourteenth Amendments. *Id.*

Several factors persuaded the court that its decision abrogating the rule was not "unexpected and unforeseeen" (J.A. 28) and could therefore be applied retroactively consistent with *Bouie* and *Marks*. Most significantly, the court's research disclosed that the year-and-a-day rule "has never served as the ground of decision in any Tennessee case" and, indeed, had been mentioned favorably by a Tennessee court only twice in the twentieth century, the last time more than twenty years ago. J.A. 27-28. In addition, the court acknowledged "the uncertainty surrounding the continuing viability of the rule in light of the passage of the 1989 Act," which had led the lower appellate courts in Tennessee actually to find that the rule had been legislatively abrogated in 1989. J.A. 28. The court also believed that its decision in this case had been clearly foreshadowed by the weight of authority from other jurisdictions disapproving the rule, "which has been abolished by every court which has squarely faced the issue" in a line of decisions commencing long before Rogers' crime. *Id.* Finally, the court emphasized that "abolition of the rule does not allow the

State to obtain a conviction upon less proof, nor does its abolition impose criminal sanctions for conduct that was heretofore innocent." *Id.* For all of these reasons, the court concluded that its abolition of the year-and-a-day rule "does not constitute an unforeseeable judicial enlargement of a criminal statute" and may be applied retroactively. *Id.*

SUMMARY OF ARGUMENT

Petitioner contends that the Tennessee Supreme Court has unforeseeably, retroactively and, therefore, unconstitutionally enlarged Tennessee's prohibition against criminal homicide by abolishing the common law year-and-a-day rule and by applying that change in the law to his case. Invoking this Court's decisions in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and *Marks v. United States*, 430 U.S. 188 (1977), he apparently believes that he should have been entitled to rely on the continuing vitality of the rule at the moment he decided to plunge a butcher knife into the victim's chest, as well as from and after the date on which the rule would have operated to bar his prosecution for homicide – that is, once Mr. Bowdery had survived his wounds for more than a year and one day after petitioner's attack. He also suggests that *Bouie* incorporated the specific prohibitions of the Ex Post Facto Clause into the Due Process Clause of the Fourteenth Amendment so as to render the former fully applicable to judicial rulings and to transform the judgment below into a forbidden ex post facto law.

But the year-and-a-day rule, properly understood, has never been deemed an element of the crime of homicide in Tennessee, and its abolition has not altered the scope of conduct punishable as homicide. While no Tennessee case affirmatively discloses the nature of the Tennessee rule or how it might have operated had it been applied before its abolition, several factors compel the conclusion that the rule was merely an exclusionary rule relating to causation and not an element of homicide. First, prior to the enactment of statutory offenses in Tennessee, the Tennessee courts did not incorporate the year-and-a-day requirement as an element in defining the offense of murder. Second, the year-and-a-day rule has never been included in a statutory definition of homicide in Tennessee. Third, the rule has never been included in pattern jury instructions frequently used as a source of instructions in the state's trial courts. Finally, had the common law rule been an element of homicide, the Tennessee Supreme Court would have been expressly forbidden by the state constitution from abolishing it on its own. Indeed, in this case the Tennessee Supreme Court's rejection of the argument that the rule was abolished when it was not included in the statutory definition of homicide in the most recent criminal code – despite the code's clear statement that conduct does not constitute an offense unless so defined – and its description of the effect of the rule's abolition – that it "simply allows the State the opportunity to attempt to prove causation" – are consistent with the conclusion that the rule was evidentiary, not elemental.

Because the rule was not an element of homicide and did not define criminal conduct, the "reasonable murderer" should not be heard to complain either that he relied on the existence of the rule as a shield against criminal liability for his acts when he committed them or that a later judicial abandonment of the rule has violated the holding of *Bouie* by denying him "fair warning" that he might be prosecuted and punished for homicide. *Bouie* and its progeny held that a criminal defendant is denied "fair warning" by a novel judicial construction that broadens the scope of a criminal statute to include conduct that no person could reasonably understand to be proscribed by the statutory language itself or by prior judicial constructions of it.

The Tennessee Supreme Court's decision in this case does not even implicate the *Bouie* "fair warning" principle, much less offend it. First, the decision below has not broadened the scope of a criminal statute because the second degree murder statute under which petitioner was convicted simply prohibits the "knowing killing of another" without requiring the perpetrator to be aware that his acts will cause death within a particular time frame. Second, any person of ordinary intelligence would have understood, whether based on the very nature of the contemplated conduct or on a reading of Tennessee's statutory definition of second degree murder, that knowingly stabbing another in the heart was likely to subject him to criminal prosecution, conviction, and punishment. Third, the practical inability of a person contemplating murder to predict whether the year-and-a-day rule will shield him from prosecution and the characteristic fluidity of the common law itself make any reliance interest

in the continued viability of the rule particularly negligible. Finally, because the common law decisions of each state's courts have always informed the decisions of every other state's courts called upon to apply the same principles, the virtually unanimous abandonment of the year-and-a-day rule by the courts of other states provided notice to petitioner that Tennessee would most likely abolish the rule.

Nor should *Bouie* be read to support petitioner's extraordinary assertion that the technical restrictions imposed by the Ex Post Facto Clause upon penal legislation have been imported wholesale into the due process guarantee and now apply to the courts, a proposition squarely at odds with this Court's repeated pronouncements on the subject dating from *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). While *Bouie* did observe that the retroactive application of an unforeseeable judicial enlargement of a criminal statute operates "like" an ex post facto law, the doctrinal source of the holding clearly is the due process principle that a criminal statute must give fair warning of what conduct it makes criminal. Furthermore, the Court's focus on the innocent character of the *Bouie* defendants' conduct – wholly irrelevant to an ex post facto analysis – and the implausibility of the notion that this Court intended to overrule, without saying so, two hundred years of precedent establishing that the Ex Post Facto Clause does not regulate judicial decision-making belie any intention of the Court to import the Ex Post Facto Clause into the Due Process Clause to regulate judicial action. Indeed, an observation of the fundamental differences between legislatures and courts and a recognition of the impact such a change would have on values

of judicial economy, federal-state comity, and the separation of powers persuasively demonstrate why any such importation should be rejected.

Nevertheless, even if two centuries of precedent are overlooked and this case is analyzed under the Ex Post Facto Clause, the decision below does not violate either the letter or the spirit of that prohibition. The Tennessee Supreme Court's retroactive abolition of the year-and-a-day rule does not violate any of the four *Calder* categories describing prohibited ex post facto laws. Because the rule does not define criminal conduct and was never a defense to a charge of homicide, abolition of the rule did not operate to criminalize otherwise innocent actions after the fact. Nor did the abolition of the rule retroactively aggravate the offense or enhance the punishment for the offense in violation of the second and third *Calder* categories. The statutory offense for which petitioner was indicted, convicted and punished was second degree murder, not some lesser offense with which he might have been charged if his victim had not died. The statutory elements of second degree murder, its assigned grade in the criminal code, and the range of possible punishments for that offense have all remained unchanged after the rule's abolition. Finally, the fourth *Calder* category is not violated by the abolition of the rule because the rule, being concerned only with the timing of the victim's death, did not specify a particular "quantum of evidence" necessary to establish causation or alter the basic requirement that the State prove beyond a reasonable doubt that the defendant knowingly injured the victim and that the victim died as a result; therefore,

abolition does not allow a homicide conviction on "less, or different, testimony" than before.

ARGUMENT

THE TENNESSEE SUPREME COURT'S RETROACTIVE ABOLITION OF THE COMMON LAW YEAR-AND-A-DAY RULE DID NOT DENY PETITIONER DUE PROCESS OF LAW

A. Under Tennessee Law, the Year-and-a-Day Rule Was Not an Element of Homicide

1. *Origins of the Rule at Common Law*

At common law, if more than a year and a day intervene between the injury and the death of the victim, the injury is not legally deemed the cause of death, and the person who inflicted the injury is not criminally responsible for the homicide. 40 C.J.S. *Homicide* § 9 (1991). The origins of the rule are obscure.

The first mention of a year-and-a-day rule came in 1278 in the English Statute of Gloucester, regulating, *inter alia*, appeals of death, one of the common law remedies for murder.[4] Donald E. Walther, *Taming A Phoenix: The Year-And-A-Day Rule in Federal Prosecutions for Murder*, 59 U. Chi. L. Rev. 1337, 1338 (1992). An appeal of death was

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[4] The other remedies were indictment at the suit of the King, later becoming in England and the United States public prosecution, and inquisition against deodands, involving the forfeiture of personal chattels that had caused death. *Commonwealth v. Ladd*, 402 Pa. 164, 166 A.2d 501, 503 (1960).

a private and vindictive process for wrongful death, originating as a custom of the ancient Germans allowing a pecuniary satisfaction, called a "weregild," to the injured party or his relatives "to expiate enormous expenses." 4 W. Blackstone, Commentaries *312-13 (1769). By the Statute of Gloucester, the prosecution of appeals of death was limited. Chapter 9 of the statute provides:

> Of Homicide in Self-Defence, or by Misfortune. Of Appeals of Murther.
>
> The King Commandeth that no Writ fhall be granted out of the Chancery for the Death of a Man to enquire whether a Man did kill another by Misfortune, or in his own Defence, or in other Manner without Felony; but he fhall be put in prison until the coming of the Juftices in Eyre, or Juftices affigned to the Gaol-delivery, and fhall put himself upon the Country before them for Good and Evil; and if it be found by the Country, that he did it in his Defence, or by Misfortune, then the Juftices fhall inform the King thereof, and the King shall take him to his Grace, if it pleafe him.
>
> It is provided alfo, that no Appeal fhall be abated fo foon as they have been heretofore; but if the Appellor declare the Deed, the Year, the Day, the Hour, the Time of the King, and the Town where the Deed was done, and with what Weapon he was flain, the Appeal shall ftand in effect: And no Appeal fhall be abated for Default of frefh Suit, if the Party fhall fue within the Year and the Day after the Deed done.

Statute of Gloucester, 1278, 6 Edw. 1, ch. 9 (Eng.), codified at 1 Statutes at Large 131 (1811) (footnotes omitted). According to the generally accepted interpretation, the

Statute of Gloucester operated like an ordinary statute of limitations, running from the death, not the injury. *Commonwealth v. Lewis*, 381 Mass. 411, 409 N.E.2d 771, 772 (1980). While at the outset there was some disagreement over whether the time should run from the blow or the death of the victim (Note, *The Abolition of the Year and a Day Rule: Commonwealth v. Ladd*, 65 Dick. L. Rev. 166, 167 (1961)), in *Heydon's Case*, 4 Coke's Reports 41, 76 Eng. Rep. 631 (1558), it was held that the time was to run from the day of death. Accordingly, Blackstone concluded that all appeals of death were required to be "sued within a year and a day after the completion of the felony by the death of the party."[5] 4 W. Blackstone, Commentaries *311.

The private appeal of death gradually became obsolete[6] and gave way to the Crown prosecution by indictment, which was unencumbered by a statute of limitations.[7] *State v. Pine*, 524 A.2d 1104, 1106 (R.I. 1987). At some point, the year-and-a-day rule made this transition as well – not as a procedural statute of limitations, but as a principle of law in homicide cases. It has been suggested that this transition may have resulted from misinterpretation (*State v. Hefler*, 310 N.C. 135, 310 S.E.2d 310, 313 (1984)), or ignorance. Walther, *supra*, at 1339.

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[5] But Sir Edward Coke stated that the time for bringing the appeal ran from the blow, not the death. 3 Coke, Institutes of Laws of England 47, 52 (c. 1620).

[6] The appeal of death was formally abolished in England in 1819. 59 Geo. 3, ch. 46, codified at 39 Statutes at Large 153-154 (1819).

[7] At common law, the principle of "Nullum tempus occurrit regi" – "time does not run against the king" – applied. *See Doggett v. United States*, 505 U.S. 647, 667 (1992).

Although it is unclear when and why the transition occurred, the common law rule has been referred to and defined in works compiling and explaining the English common law. Sir Matthew Hale's History of the Pleas of the Crown (1736) together with William Hawkins' Pleas of the Crown (1716) are said to form the basis of the modern criminal law. H. Potter, An Historical Introduction to English Law 249 (2nd ed. 1943). Hale refers to the rule in his treatise:

> If a man give another a stroke, which it may be, is not in itself so mortal, but that with good care he might be cured, yet if he die of his wound within the year and a day, it is homicide or murder, as the case is, and so it hath been always ruled.

1 Hale, History of the Pleas of the Crown, ch. 33 at 428 (1736). Hawkins also refers to the rule:

> Also it is agreed, that no person shall be adjudged by any act whatever to kill another who doth not die thereof within a year and a day after; in the computation whereof, the whole day in which the hurt was done shall be reckoned the first.

Elliott v. Mills, 335 P.2d 1104, 1107 (Okla. Crim. App. 1959) (quoting 1 Hawkins' Pleas of the Crown, ch. 13, § 9 (8th ed. 1824)).

Lord Coke included the rule in his definition of murder:

> Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature in rerum natura under the king's peace, with

> malice aforethought, either expressed by the party, or implied by law, so as the party wounded, or hurt, &c. die of the wound, or hurt, &c. within a year and a day after the same.

3 Coke, Institutes at 47. Blackstone, purporting to recite Coke's definition, did not include the rule:

> Murder is, therefore, now thus defined or rather described by Sir Edward Coke: when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied.

4 Blackstone's Commentaries *195. But two pages later, Blackstone remarks:

> In order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered.

Id. at 197.

As the Tennessee Supreme Court noted in its opinion below (J.A. 16-17), three justifications are generally offered for the common law rule. By far the most frequently discussed is that medical science was incapable of establishing causation when a considerable lapse of time intervened between the injury and the victim's death. *See People v. Snipe*, 25 Cal. App. 3d 742, 102 Cal. Rptr. 6, 7 (1972); *United States v. Jackson*, 528 A.2d 1211, 1216 (D.C. 1987); *Jones v. Dugger*, 518 So.2d 295, 296 (Fla. App. 1987); *State v. Cross*, 260 Ga. 845, 401 S.E.2d 510, 511 (1991); *People v. Carrillo*, 164 Ill. 2d 144, 207 Ill. Dec. 16, 646 N.E.2d 582, 584 (1995); *Lewis*, 409 N.E.2d at 773; *People v. Stevenson*, 416 Mich. 383, 331 N.W.2d 143, 145 (1982);

State v. Gabehart, 114 N.M. 183, 836 P.2d 102, 105 (1992); *State v. Vance*, 328 N.C. 613, 403 S.E.2d 495 (1991); *Hefler*, 310 S.E.2d at 313; *State v. Sandridge*, 365 N.E.2d 898, 899 (Ohio Ct. C. P. 1977); *Ladd*, 166 A.2d at 506; *Ruane*, 912 S.W.2d at 774; *Pine*, 524 A.2d at 1106. This justification follows the reasoning of Lord Coke, who said that if the person alleged to have been murdered "die after that time, it cannot be discerned, as the law presumes, whether he died of a stroke or poyson, etc., or a natural death; and in case of life, the rule of law ought to be certain." 3 Coke, Institutes at 53.

Second, the rule is sometimes traced to the early function of the jury as witnesses of events in the vicinage. Under this early English practice, jurors were required to rely on their own knowledge to reach a verdict, without resort to expert medical testimony; and they would not have had sufficient knowledge to trace cause to effect over a sizeable time interval. *Jackson*, 528 A.2d at 1216; *Lewis*, 409 N.E.2d at 773; *Stevenson*, 331 N.W.2d at 145-46; *Sandridge*, 365 N.E.2d at 899.

Finally, the rule has occasionally been described as an attempt to mitigate the harshness of the common law practice of indiscriminately imposing the death penalty for all homicides. *Jackson*, 528 A.2d at 1216; *Lewis*, 409 N.E.2d at 733; *Hefler*, 310 S.E.2d at 313; *Ladd*, 166 A.2d at 506.

The rule has been characterized variously by American state courts as a rule of evidence (*People v. Clark*, 106 Cal. App. 2d 771, 235 P.2d 56, 59-60 (1951); *State v. Huff*, 11 Nev. 17 (1876); *Commonwealth v. Evaul*, 5 Pa. D. & C. 105, 106 (1922); 40 C.J.S. *Homicide* § 10 (1991); 40 Am.

Jur.2d *Homicide* § 14 (1999)); an element of the offense (*State v. Young*, 77 N.J. 245, 390 A.2d 556, 559 (1978)); a rule of evidence and procedure (*Head v. State*, 68 Ga. App. 759, 24 S.E.2d 145, 147 (1943); *Ladd*, 166 A.2d at 504)); a rule of "procedure, pleading as well as evidence" (*Elliott*, 335 P.2d at 1111-12)); a conclusive presumption (*State v. Brown*, 21 Md. App. 91, 318 A.2d 257, 261 (1974); *State v. Orrell*, 12 N.C. 139, 141 (1826); Walther, *supra*, at 1349)); and a rule of substantive law. *People v. Corder*, 360 Ill. 264, 137 N.E. 845, 849 (1922); *State v. Moore*, 196 La. 617, 199 So. 661, 662-63 (1940); *State v. Zerban*, 617 S.W.2d 458, 458-59 (Mo. 1981); *Gabehart*, 836 P.2d at 105-06.

Significantly, this Court has described the rule as one of evidence (*Louisville, E. & St. L. R. Co. v. Clarke*, 152 U.S. 230, 241 (1894) ("In prosecutions for murder, the rule was one simply of criminal evidence")), and as one of pleading. *Ball v. United States*, 140 U.S. 118, 132 (1891) (declaring murder indictment "fatally defective" for failure to aver time and place of death, and noting that "by the common law both time and place of death were required to be alleged" to show jurisdiction in the court).

2. *The Rule in Tennessee*

Although "the common law of England as it stood at and before the separation of the colonies" has been adopted by the State of Tennessee (*Smith v. State*, 215 Tenn. 314, 385 S.W.2d 748, 750 (1965)), the common law year-and-a-day rule has not played any role in Tennessee jurisprudence. Before this case, the rule had been mentioned in only three appellate opinions. The discussion of the rule in each of these opinions is dicta.

In *Percer v. State*, 118 Tenn. 765, 103 S.W. 780 (1907), the Tennessee Supreme Court reversed the defendant's second degree murder conviction because the defendant was not present in court when the verdict was announced and because the proof failed to show that the murder occurred prior to the finding of the indictment. *Id.*, 103 S.W. at 782-83. In passing, the court simply stated, quoting Wharton on Homicide, that "[i]n murder, the death must be proven to have taken place within a year and a day of the injury received." *Id.*, 103 S.W. at 783. This is the only mention of the rule by the Tennessee Supreme Court in any prior case.

Sixty-seven years passed before the rule was referred to again. In *Cole v. State*, 512 S.W.2d 598 (Tenn. Crim. App. 1974), the Court of Criminal Appeals affirmed the defendants' convictions for involuntary manslaughter. The two defendants were drag racing when one of the vehicles struck the automobile driven by the victim, who died shortly after he was taken to a hospital emergency room. Although there was no issue that the victim had died within a year and a day of the injury, the court remarked: "The common law provides that death must ensue within a year and a day from the infliction of the mortal wound to constitute punishable homicide." *Id.* at 601.

Finally, twenty-one years later, the rule was mentioned in *State v. Ruane, supra*. Although there was no dispute that the second degree murder victim died ten days after being shot by the defendant, the court observed that "[a]t common law, the proof must have established that the victim died within a year and a day from the date of the injury received." *Id.* at 774. The court opined that, in any event, the common law rule had been

abolished by the 1989 Criminal Sentencing Reform Act (Tenn. Code Ann. §§ 39-11-101, *et seq.* (1991)), since it was not specifically listed as a statutory affirmative defense. *Id.*

None of these Tennessee cases affirmatively discloses the nature of the Tennessee rule or how it might have operated had a Tennessee court ever been required to apply it before its abolition in this case. Yet several factors compel the conclusion that the rule was not an element of homicide, but was merely an exclusionary rule of evidence relating to causation, *i.e.*, unless the victim died within a year and a day, the prosecution was not permitted to offer proof that he died of the injury received.

First, prior to the enactment of the first homicide statute in 1829 (*see* 1829 Tenn. Pub. Acts, ch.23), which created the statutory offense of murder and divided it into degrees, the crime of murder was defined by case law. In *Fields v. State*, 9 Tenn. 156 (1829), the Supreme Court of Errors and Appeals set forth the elements of common law murder in Tennessee. Justice Whyte, quoting Lord Coke, opined that murder is " 'where a person of sound mind and discretion, unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought either express or implied.' " *Id.* at 159. Justice Peck, also quoting Lord Coke, declared that murder " 'is when a man of sound memory and of the age of discretion, unlawfully killeth, within any county of the realm, any reasonable creature in rerum natura, under the king's peace, with malice aforethought, either express or implied.' " *Id.* at 162. Neither definition incorporates the year-and-a-day requirement as an element of murder,

despite the fact that Lord Coke specifically included it in his definition. *See* 3 Coke, Institutes at 47. Although the "year-and-a-day" rule was part of the common law in Tennessee, it was obviously not viewed as an element of murder by the early Tennessee courts.

Second, the year-and-a-day rule has never been included in a statutory definition of homicide in Tennessee. *See* Code of Tennessee § 4597 (1858); Shannon's Code of Tennessee § 6438 (1918); Code of Tennessee § 10767 (1931); Tennessee Code Annotated §§ 39-2401 (1955 & 1975); 39-2-210 (1982); 39-13-210 (1991 & 1997). Indeed, in rejecting respondent's concession below that the rule was a substantive principle of law necessarily abolished by the enactment of a new criminal code in 1989 because not included there as part of the definition of homicide (J.A. 22-24), the Tennessee Supreme Court must be deemed to have rejected any notion that the rule was an element of homicide. Petitioner here concedes as much when he insists that the rule "has no bearing upon either the actus reus or mens rea of a criminal offense" (Brief at 22) and, therefore, could not have been abolished by the 1989 Criminal Code. *See* Tenn. Code Ann. § 39-11-102(a) (1997) ("Conduct does not constitute an offense unless it is defined as an offense by statute, municipal ordinance, or rule authorized by and lawfully adopted under a statute.")

Third, the Tennessee Pattern Jury Instructions, prepared by a committee of the Tennessee Judicial

Conference[8] and frequently used as a source of instructions in the state's trial courts,[9] have never included the year-and-a-day rule as either an element of homicide or an element of causation. Tennessee Pattern Jury Instructions – Criminal, 7 Tenn. Practice §§ 20.01-20.08 (Homicide), § 37.11 (Cause of Death) (1st ed. 1978); §§ 20.01-20.09 (Homicide), § 37.11 (Cause of Death) (2d ed. 1988); §§ 7.01-7.08 (Criminal Homicide) (3d ed. 1992); §§ 7.01(a)-7.10 (Criminal Homicide), § 42.14 (Cause of Death) (4th ed. 1995); §§ 7.01(a)-7.11 (Criminal Homicide), § 42.14 (Cause of Death) (5th ed. 2000). In Tennessee, the trial court has the duty of instructing the jury on the essential elements of the offenses charged, whether requested by the defendant or not. *State v. Brewer*, 932 S.W.2d 1, 16 (Tenn. Crim. App. 1996).[10]

Finally, had the common law year-and-a-day rule been an element of criminal homicide, the Tennessee Supreme Court would have been expressly forbidden by the state constitution from abolishing the rule on its own. Article XI, § 1, of the Constitution of Tennessee (1870) provides, in pertinent part, that "[a]ll laws and ordinances now in force and use in this State, not inconsistent with this Constitution, shall continue in force and use until they shall expire, be altered or repealed by the

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[8] The Tennessee Judicial Conference consists of the judges of all courts of record whose salary is paid in whole or in part out of the state treasury. Tenn. Code Ann. § 17-3-101 (1994).

[9] *State v. Rutherford*, 876 S.W.2d 118, 120 (Tenn. Crim. App. 1993).

[10] Petitioner's jury was not instructed on the year-and-a-day rule. R. Vol. VI, 1-17.

Legislature. . . . " It must be assumed that the Tennessee Supreme Court fulfilled its constitutional duty. *See Harrison v. NAACP*, 360 U.S. 167, 178 (1959). Indeed, consistent with this duty, in abolishing the rule, the Tennessee Supreme Court focused on its evidentiary character, emphasizing that modern medical science had rendered the rule's concern with proof of causation obsolete. J.A. 17-21. Clearly, the court viewed the rule as evidentiary in nature:

> Therefore, regardless of whether its demise was achieved by legislation or judicial action, in other jurisdictions, abolition of the year-and-a-day rule has not altered the general principle that causation be proven beyond a reasonable doubt. *Its abolition simply allows the State the opportunity to attempt to prove causation.*

J.A. 21 (emphasis added).

B. Because the Rule Was Not an Element of Homicide and Did Not Define Criminal Conduct, Its Retroactive Abolition Did Not Deprive Petitioner of His Due Process Right to Fair Warning

Given the nature of the year-and-a-day rule, neither *Bouie v. City of Columbia, supra,* nor *Marks v. United States, supra,* supports petitioner's claim that its retroactive abolition violated his due process "right to fair warning" and invalidates his second degree murder conviction.

The defendants in *Bouie*, arrested during a "sit-in" at a drugstore lunch counter, stood convicted of criminal trespass under a South Carolina statute prohibiting "entry upon the lands of another . . . after notice from the

owner or tenant prohibiting such entry. . . . "[11] 378 U.S. at 349 (internal quotation marks omitted). Despite the absence of any evidence that they had received notice prohibiting their entry into the store before they entered, the South Carolina Supreme Court had nevertheless sustained their trespass convictions by construing the statute "to cover not only the act of entry . . . after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave." 378 U.S. at 350. Because the state court's construction was "so clearly at variance with the statutory language" and had "not the slightest support in prior South Carolina decisions" applying the statute (378 U.S. at 356), this Court reversed, finding that the defendants' convictions had been procured without "the first essential of due process of law" (378 U.S. at 351 (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939))), namely, "fair warning that . . . contemplated conduct constitutes a crime." 378 U.S. at 355. While acknowledging the right of South Carolina's judiciary authoritatively to construe that state's penal statutes, this Court concluded that the Due Process Clause of the Fourteenth Amendment forbids retroactive application of "a judicial construction of a criminal statute" that "is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue. . . . " 378 U.S. at 354 (internal quotation marks omitted). When, as in *Bouie*, the defendant's acts are not even "improper or immoral," the due process right of fair warning forbids the retrospective imposition of "criminal

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[11] Section 16-386, Code of Laws of South Carolina, 1952 (1960 Supp.).

penalties for conduct committed at a time when it was not fairly stated to be criminal." 378 U.S. at 362. "The underlying principle," the Court explained, "is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." 378 U.S. at 351 (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)).

Following *Bouie*, in *Marks v. United States*, 430 U.S. 188 (1977), this Court reversed the defendants' federal obscenity convictions under the Due Process Clause of the Fifth Amendment because the trial court had instructed the jury under the more expansive definition of constitutionally unprotected hard-core pornography announced in *Miller v. California*, 413 U.S. 15 (1973), after the period covered by the indictment. Comparing the *Miller* definition with the prior construction of the relevant statute adopted in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), the Court determined that "some conduct which would have gone unpunished in *Memoirs* would result in conviction under *Miller*." *Marks*, 430 U.S. at 194. Noting the importance of "fair warning when a statute regulates expression and implicates First Amendment values," the Court concluded that *Bouie* "preclude[d] the application . . . of the standards announced in *Miller* . . . to the extent that those standards may impose criminal liability for conduct not punishable under *Memoirs*." 430 U.S. at 196. *See also Rabe v. Washington*, 405 U.S. 313 (1972) (conviction reversed because based on an unforeseeable judicial expansion of conduct covered by state obscenity statute); *United States v. Lanier*, 520 U.S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that

neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.").

The decision below does not even implicate the *Bouie* "fair warning" principle, much less offend it. First and most significantly, the Tennessee Supreme Court's abolition of the year-and-a-day rule has not broadened the scope of the conduct covered by Tennessee's second degree murder statute. The statute under which petitioner was convicted warns all Tennesseans that second degree murder is "[a] knowing killing of another," Tenn. Code Ann. § 39-13-210(a)(1) (1991), and, in addition, that a person acts "knowingly with respect to conduct . . . when the person is aware of the nature of the conduct," and "knowingly with respect to a result . . . of conduct when the person is aware that the conduct is reasonably certain to cause the result." Tenn. Code Ann. § 39-11-302(b) (1991). The statutory definition of the crime thus focuses exclusively upon the perpetrator's awareness of the nature of his acts, as well as his awareness that his acts are "reasonably certain" to cause someone to die. But the words of the statute do not require the perpetrator to be aware that his acts will cause his victim to die within any particular time frame. Thus, the elimination of the year-and-a-day rule – which merely establishes an arbitrary deadline by which a victim of such acts must die and is not at all concerned with the actor's conduct or his awareness of its consequences – does not operate to expand the class of acts and mental states that qualify for prosecution under the statute.

Furthermore, the retroactive elimination of the rule cannot be said to have deprived petitioner of "fair warning" that his conduct risked prosecution under the

statute. Although "it is not likely that a criminal will carefully consider the text of the law before he murders or steals," *McBoyle v. United States*, 283 U.S. 25, 27 (1931), if petitioner had visited a law library on the afternoon preceding the crime to research the question whether stabbing another person in the heart might draw a homicide charge from the State of Tennessee, a brief glance at the criminal code would have alerted him to the legal risks of such conduct. Any person of ordinary intelligence ought to understand that inflicting a stab wound to the heart is "reasonably certain" to cause the death of the recipient, and, upon reading Tennessee's statutory definition of second degree murder, petitioner would have discovered that such conduct is subject to prosecution. On the other hand, he would not have learned anything useful from studying Lord Coke's exposition of the year-and-a-day rule. Because the rule does not address what types of conduct may give rise to liability for criminal homicide, even the most comprehensive review of the rule's origins, history and current status in all fifty states would not have supplied petitioner with the answer he was seeking.

Of course, legal texts provide only one source of "fair warning" for due process purposes; common sense also counts for something in the analysis. *See Smith v. Goguen*, 415 U.S. 566, 584 (1974) (White, J., concurring in the judgment) ("It is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is [conduct] . . . covered by the statute. . . . "). Unlike the conduct at issue in *Bouie*, which was neither "improper" nor "immoral" (378 U.S. at

362), and in *Marks*, which involved "a form of communication and entertainment acceptable to a substantial segment of society" (430 U.S. at 198 (Stevens, J., concurring in part and dissenting in part)), the very nature of petitioner's acts should be deemed to have supplied him with constitutionally sufficient advance notice of their criminality, notwithstanding the Tennessee Supreme Court's later withdrawal of the benefits of the year-and-a-day rule. It is simply not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952). Petitioner's acts were plainly calculated to land him in the heart of criminal territory, not just "perilously close" to the border.

Nor is the decision below vulnerable to attack on the ground that it undermines some reliance interest of the petitioner that demands protection. The policy goal of *Bouie*'s "fair warning" principle is to enhance individual liberty by insuring the predictability and stability of the legal rules that define and punish criminal misconduct. "[I]ndividuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). But the year-and-a-day rule lacks the stuff from which "settled expectations" can reliably be constructed. As we have already emphasized, the rule conveys no information to assist an actor in locating the line between legal and illegal conduct or between lesser and greater degrees of homicide. Moreover, the event that triggers the shield from prosecution afforded by the rule – the occurrence of

the victim's death beyond a year and a day from his injury – is not typically within the perpetrator's control. For that reason, no one can claim to "rely" in any meaningful sense on the potential benefits of the year-and-a-day rule when planning a butcher knife attack. One simply cannot know in advance of launching such an attack how long the intended victim might linger after injury.[12]

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[12] Petitioner also suggests (Brief at 15) that he was entitled to rely on the rule once his victim "slipped into a coma" and that this reliance was "heightened" once his victim survived a year and one day. But the "fair warning" required by the Fourteenth Amendment is fair warning at the time of the conduct. *Bouie*, 378 U.S. at 355; *Lanier*, 520 U.S. at 259; *Hamling v. United States*, 418 U.S. 87, 115 (1974). To the extent petitioner is arguing that he acquired either a "liberty" or "property" interest in avoiding prosecution for murder that is entitled to due process protection after the passage of a year and a day, that argument was neither pressed nor passed upon below. Therefore, this Court may not consider it. *Illinois v. Gates*, 462 U.S. 213, 217-23 (1983).

In any event, the liberty interests protected by the Due Process Clause are "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' . . . such that 'neither liberty nor justice would exist if they were sacrificed.' " *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations omitted). Protected interests in property are not created by the Constitution, but rather are derived from applicable statutes, regulations, or contracts (*see Goss v. Lopez*, 419 U.S. 565, 572-73 (1975)), transcending "an abstract need or desire" or a "unilateral expectation" and qualifying as "a legitimate claim of entitlement." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). For the reasons stated, the common law year-and-a-day rule obviously created no liberty or property interest entitling Rogers to constitutional protection.

The weight of any reliance interest petitioner might claim in the year-and-a-day rule is further diminished by the fact that it is a common law, rather than statutory, principle. The genius of the common law is its flexibility to adapt to each new situation as justice demands: "It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Funk v. United States*, 290 U.S. 371, 383 (1933). The engines driving the constant evolution of the common law are " 'reason and experience.' " *Trammel v. United States*, 445 U.S. 40, 46 (1980) (quoting *Hawkins v. United States*, 358 U.S. 74, 79 (1958)). Thus, "[o]ne of its oldest maxims was that where the reason of a rule ceased the rule also ceased . . . No rule of the common law could survive the reason on which it was founded. It needed no statute to change it but abrogated itself." *Funk*, 290 U.S. at 383 (quoting *Ketelsen v. Stilz*, 184 Ind. 702, 707, 111 N.E. 423, 425 (1916)).

If it is true, as these pronouncements surely illustrate, that common law evolution is a self-executing mechanism, then it must follow that principles such as the year-and-a-day rule can move into, and out of, the common law without need of formal announcement. And the consequences are fatal to any claim petitioner might make to justifiable reliance on the rule. On the level of theory, this phenomenon renders it impossible to pinpoint exactly when the year-and-a-day rule ceased to operate in Tennessee and, therefore, impossible to label the Tennessee Supreme Court's disapproval of the rule in petitioner's case truly "retroactive." The rule ceased to operate in Tennessee whenever "reason and experience" dictated its

demise. Petitioner's case merely presented the occasion for the Tennessee Supreme Court to remark upon the change. After all, as the court below noted, the year-and-a-day principle had been a part of the common law of Tennessee only in an academic sense, never having supplied the rule of decision in a single reported case and only having been mentioned in passing twice before petitioner committed his crime in 1994. Until petitioner invoked the rule, its continued viability had never been tested in the light of "reason and experience" by any Tennessee appellate court.

On a more practical plane, this characteristic flexibility of the common law should also serve as "fair warning" to those who would rely on one of its "loophole" principles like the year-and-a-day rule that they may suffer disappointment should the need ever arise to duck through the loop. Unlike a "narrow and precise" statutory provision of the sort involved in *Bouie*, which "lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction" (378 U.S. at 351-52), common law doctrine is considerably less secure, precisely because it is made by judges in the course of deciding real cases. Common law judges do not dispense justice based on a mechanical application of the "plain meaning" of the words printed in the pages of Blackstone's Commentaries. Rather, they fashion a rule suited to the particular circumstances of the case in light of their understanding of the principles of the common law, and then they apply the rule, retroactively, to decide the case. If one seeks to rely upon the

common law, he should be required to take into account the entire body of that law, including the maxim stated above that old rules give way to the demands of justice as "reason and experience" dictate. Where, as here, the only claim of entitlement to the benefits of a common law rule is based on narrow self interest, unrelated to the reasons that supported the development of the rule in the first place, one should not be heard to cry "unfair surprise" when the common law balks.

Finally, the common law origin of the year-and-a-day rule compels rejection of petitioner's complaint that he should have been entitled blindly to rely upon its continued vitality in Tennessee without taking into account the weight of authority from other jurisdictions disapproving the rule. The principles of the common law are not specific to a particular jurisdiction. They derive from a common source, England,[13] and the courts of all common law jurisdictions in the United States, like the Tennessee Supreme Court in this case, routinely invoke common law judicial decisions of other states as authority for their own decisions.[14] While, as petitioner notes, it may be the

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[13] *See generally* Herbert Pope, *The English Common Law in the United States*, 24 Harv. L. Rev. 6 (1910).

[14] *See, e.g., Woods v. Harry B. Woods Plumbing Co.*, 967 S.W.2d 768, 772 (Tenn. 1998) (abolishing common law "aggressor defense" in workers' compensation actions, relying on rejection by a "majority of jurisdictions"); *Carson v. Headrick*, 900 S.W.2d 685, 688-90 (Tenn. 1995) (reaffirming common law policemen and firemen's rule precluding firefighters and police officers from recovering damages for injuries arising out of risks peculiar to their employment, citing reaffirmation by the "vast majority of courts"); *McIntyre v. Balentine*, 833 S.W.2d 52, 55-56 (Tenn. 1992) (abolishing common law defense of contributory

"rare situation in which the meaning of a *statute* of another State sufficed to afford a person 'fair warning' that his own State's *statute* meant something quite different from what its words said" (*Bouie*, 378 U.S. at 359-60 (emphasis added)),[15] the common law decisions of each state's courts have always informed the decisions of every other state's courts called upon to apply the same principles.[16] The virtually unanimous abandonment of the year-and-a-day rule by common law courts across the country should have signaled to petitioner that Tennessee too would most likely follow the trend. *See* J.A. 17-18 n.4.

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negligence, noting shift to comparative fault in 45 states); *Dupuis v. Hand*, 814 S.W.2d 340, 344-46 (Tenn. 1991) (abolishing common law tort of alienation of affection, noting abolition or limitation in 35 states); *Hanover v. Ruch*, 809 S.W.2d 893, 897 n.6 (Tenn. 1991) (abolishing common law tort of criminal conversation, noting "clear nationwide trend" towards abolition).

[15] *But cf. Rose v. Locke*, 423 U.S. 48 (1975) (Tennessee statute prohibiting "crimes against nature" held to provide fair warning that fellatio was covered conduct, in part, because the courts of Georgia, Missouri, Maine and Florida had construed similarly-worded statutes in those jurisdictions to apply to such conduct.)

[16] Pope, *supra*, 24 Harv. L. Rev. at 15 ("Opinions in . . . cases from other jurisdictions, when based on general principles, or on general sources of law common to all courts, will always be persuasive and especially valuable . . . "); and at 15 n.11 ("No one, therefore, who is to engage in the practice of law anywhere in this country can safely confine his knowledge of the law to the cases of a particular jurisdiction.").

C. The Due Process Right to Fair Warning Does Not Subject Judicial Decision-Making to the Technical Restrictions Imposed by the Ex Post Facto Clause upon Penal Legislation

The Tennessee Supreme Court's application of its decision abolishing the year-and-a-day rule to petitioner's case did not violate *Bouie*'s fair warning principle because the court's action (1) did not expand the scope of the conduct covered by Tennessee's second degree murder statute, (2) did not retroactively deprive petitioner of notice that his conduct risked prosecution and punishment under that statute, and (3) did not disturb any reasonable reliance interest petitioner might have asserted in the operation of the rule as of the time he stabbed his victim or thereafter. In respondent's view, these factors should dispose of petitioner's due process claim and provide ample grounds to affirm the judgment below.

But petitioner apparently believes that *Bouie*'s due process analysis transcends mere considerations of "fair warning" and, in addition, demands that the judgment of the Tennessee Supreme Court be examined as if it had been enacted by the legislature in the form of a statute, in order to determine whether it violates the constitutional prohibition against ex post facto laws. He thus, in effect, argues that the technical restrictions placed upon retroactive penal legislation by the Ex Post Facto Clause, U.S. Const. art. I, § 10, apply with equal force to judicial decisions through the Due Process Clause of the Fourteenth Amendment.

Contrary to petitioner's assumption, *Bouie* has not already accomplished this result. Although the *Bouie* Court did observe that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely *like* an ex post facto law" (378 U.S. at 353 (emphasis added)), earlier the Court clearly identified the doctrinal source of its holding as "[t]he basic principle that *a criminal statute must give fair warning* of the conduct that it makes a crime" (378 U.S. at 351) (emphasis added), in other words, "the first essential of due process of law" (*id.*, quoting *Lanzetta, supra*) which forms the basis of the Court's "void-for-vagueness" jurisprudence under the Due Process Clause:

> *If the Fourteenth Amendment is violated* when a person is required 'to speculate as to the meaning of penal statutes,' as in *Lanzetta [v. New Jersey, supra]*, or to 'guess at (the statute's) meaning and differ as to its application,' as in *Connally [v. General Const. Co.*, 269 U.S. 385 (1926)], *the violation is that much greater* when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.

378 U.S. at 352 (emphasis added). The Court's later invocation of the Ex Post Facto Clause as additional support for its conclusion must therefore be regarded as dicta. Furthermore, other aspects of the *Bouie* opinion belie any intention to transform the Due Process Clause into a surrogate Ex Post Facto Clause regulating judicial action. For example, the Court's focus on the innocent character

of the *Bouie* defendants' conduct as a "particularly compelling" factor in its "fair warning" calculus is wholly inconsistent with Ex Post Facto Clause jurisprudence.[17] The moral quality of the defendant's conduct is irrelevant for purposes of determining whether a statute applied to punish that conduct falls within the ex post facto prohibition. *See, e.g., Carmell v. Texas*, 529 U.S. ___, 120 S.Ct. 1620 (2000) (Texas statute relaxing evidentiary requirements for sexual assault convictions deemed an ex post facto law as applied to defendant's sexual molestation of his teenage stepdaughter). Read in context, *Bouie*'s references to ex post facto principles thus reflect no more than a recognition that both constitutional provisions – the Ex Post Facto Clause and the Due Process Clause – share a common concern: the unfairness of criminalizing conduct, or of escalating its penal consequences, after the fact.

Moreover, petitioner's interpretation of *Bouie* rests on the wholly implausible premise that the Court intended to overrule two hundred years of precedent without saying so. The proposition that the Ex Post Facto Clause does not regulate judicial decision-making has been established since *Calder v. Bull, supra*, this Court's first opportunity to address the meaning of the Clause and the most authoritative exposition of the Framers' original understanding of the scope of its protections. *See Carmell*, 120 S.Ct. at 1626-29. Writing for the Court in *Calder*, Justice

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[17] "Application of the rule [forbidding unforeseeable, retroactive judicial enlargement of criminal statutes] is particularly compelling where, as here, the petitioners' conduct cannot be deemed improper or immoral." *Bouie*, 378 U.S. at 362.

Chase expressed the view that the Framers' aim had been to restrain the power of the members of the legislative branch, whose enactments were often "stimulated by ambition, or personal resentment, and vindictive malice" (3 U.S. (3 Dall.) at 389): " . . . [T]he plain and obvious meaning and intention of the prohibition is this; that *the Legislatures* of the several states, shall not pass laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it." *Id.* at 390 (emphasis added). In a separate opinion Justice Paterson addressed the claim that the Connecticut resolution at issue in *Calder* had been enacted in the legislature's exercise of its pre-Revolutionary War judicial powers. He too recognized that the Ex Post Facto Clause reflects the Framers' distrust of the "bold, unprincipled, aspiring, and party men" (*id.* at 396) who typically inhabit legislative bodies, but he cautioned that "if the Legislature of the State . . . acted in their customary judicial capacity . . . there is an end of the question." *Id.* at 395. Justice Iredell echoed this view (*id.* at 400) ("if the act of the Legislature of Connecticut was a judicial act, it is not within the words of the Constitution"), as did Justice Cushing. *Id.* ("If the act is a judicial act, it is not touched by the Federal Constitution."). In the two centuries since *Calder*, this Court has never questioned the views expressed by these four Justices that the Ex Post Facto Clause regulates penal legislation, not court decisions. *See, e.g., Frank v. Mangum*, 237 U.S. 309, 344 (1915) ("the constitutional prohibition . . . is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts."); *Ross v. Oregon*, 227 U.S. 150, 161 (1913) ("But . . . [the Ex Post Facto Clause],

according to the natural import of its terms, is a restraint upon legislative power, and concerns the making of laws, not their construction by the courts.").

Petitioner offers no persuasive reason why this well-settled limitation on the scope of the ex post facto prohibition should now be abandoned under cover of the Due Process Clause of the Fourteenth Amendment. Although he speculates that "[s]tate supreme courts which are politically accountable to the electorate may be susceptible to the same kind of influences which justify the ex post facto limitations placed on legislatures" (Brief at 16), he cites no social or political science data to support that extraordinary charge, or even anecdotal evidence that the country's state appellate courts are now populated by men and women who menace our liberty through decisions "stimulated by ambition, or personal resentment, and vindictive malice." *Calder*, 3 U.S. (3 Dall.) at 389. Petitioner's argument also fails to appreciate the fundamental institutional distinction between legislatures and courts, as well as the relevance of that distinction to the values protected by the Ex Post Facto Clause:

> . . . [T]he policy of the prohibition against ex post facto legislation would seem to rest on the apprehension that the legislature, in imposing penalties on past conduct . . . may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons. *That this policy is inapplicable to decisions of the courts seems obvious: their opportunity for discrimination is more limited than the legislature's in that they can only act in construing existing law in actual litigation.*

James v. United States, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., concurring in part and dissenting in part) (emphasis added). *Cf. Richmond v. J. A. Croson Co.*, 488 U.S. 469, 513-14 (1989) (Stevens, J., concurring) ("The constitutional prohibitions against the enactment of ex post facto laws and bills of attainder reflect a valid concern about the use of the political process to punish . . . past conduct of private citizens," whereas "[i]t is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that . . . would have existed had no wrong been committed.").[18]

This Court's steadfast refusal to extend the technical requirements of the ex post facto prohibition beyond the legislative arena serves other important interests that petitioner ignores. As Justice Harlan warned in his separate opinion in *James*, *supra*:

> Given the divergent pulls of flexibility and precedent in our case law system, it is disquieting to think what perplexities and what subtleties of distinction would be created in applying this policy, which so properly limits legislative action, to the decisions of the courts.

366 U.S. at 247 n.3 (Harlan, J., concurring and dissenting). Most obviously, petitioner's view would open up a

[18] *See also* Dan M. Kahan, *Some Realism About Retroactive Criminal Lawmaking*, 3 Roger Wms. U. L. Rev. 95, 112, 116 (1997) (noting that the Ex Post Facto Clause operates "to counteract the legislative bias toward severity" in the field of criminal legislation, which does not infect judges, who, by training, experience and institutional tradition "take . . . a longer view of the task of criminal lawmaking".)

boundless new frontier of litigation in criminal cases, since every judicial interpretation of the language of a criminal statute, every judicial modification of a principle of evidence, and every judicial sentencing determination might support a colorable ex post facto claim if applied to the disadvantage of the defendant in the case before the court. And, quite apart from concerns of judicial economy, the implications for the proper maintenance of the federal-state balance are even more serious. By subjecting judicial decision-making to Ex Post Facto Clause scrutiny, petitioner would transform state court rulings on a vast array of purely state law matters into issues of federal constitutional significance warranting intrusive federal court supervision. Indeed, it was precisely this objection that led the Court to decline a similar invitation to apply Article I, § 10's parallel Contracts Clause to state court decisions:

> It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us [by U.S. Const. art. I, § 10] is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary.

Commercial Bank of Cincinnati v. Buckingham, 46 U.S. (5 How.) 317, 343 (1847). Finally, the presumption of retroactivity that has historically applied to judicial decisions[19] –

[19] *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 94 (1993) ("Nothing in the Constitution alters the fundamental rule

and that petitioner would completely abolish in the criminal context – reinforces the horizontal separation of powers by forcing courts to focus upon the impact of their rulings on the litigants before them, thus discouraging departures from prior precedent and thereby serving as "one of the understood checks on judicial lawmaking." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment); *see also* Harold J. Krent, *Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 Roger Wms. U. L. Rev. 35, 82 (1997) ("Retroactive application of all new judicial rulings raises the price of change, for judges must be willing to alter the rights not only of the parties before them, but of all similarly situated litigants. When judges recognize that any departure from the status quo has problematic consequences, then they may be more chary of change."). Regulating judicial decision-making under the Ex Post Facto Clause would jeopardize all of these values.

D. Even If the Decision Below Were Reviewed Under the Standards Applicable to Retroactive Penal Legislation, There Would Be No Constitutional Violation

In any event, the decision below would not offend the Ex Post Facto Clause if that provision were applicable to court decisions. The ex post facto prohibition forbids:

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of 'retrospective operation' that has governed '[j]udicial decisions . . . for near a thousand years.' ") (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)).

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Calder, 3 U.S. (3 Dall.) at 390.

The Tennessee Supreme Court's retroactive abolition of the year-and-a-day rule does not violate the first category. Petitioner's actions plainly fell within the ambit of Tennessee's second degree murder statute, which proscribes the "knowing killing of another"; his actions were not "innocent when done." The abolition of the rule did not expand the definition of the crime, because the statutory offense does not require either that the victim die within any particular time frame or that the perpetrator know the victim will die within a particular time frame. As we have already discussed, the year-and-a-day rule was neither an element of the crime of homicide under Tennessee law nor a defense to a charge of homicide.

Petitioner's claim that the decision below violates *Calder*'s second and third categories rests upon the erroneous premise that a crime other than the one for which he was actually indicted, convicted and punished should serve as the "benchmark" crime for purposes of determining whether there has been unconstitutional retroactive aggravation of the offense or enhancement of

punishment. Petitioner correctly notes that, until his victim died, he could only have been charged with an attempted homicide or an assault. Since death occurred more than a year and one day after the attack, the argument continues, the abolition of the rule should be viewed both as having aggravated his offense – from one of these lesser offenses into homicide – and as having increased the punishment that his actions warranted under the law in effect at the time he stabbed the victim. But the statutory offense for which petitioner was indicted, convicted and punished was second degree murder. Obviously, the crime was not consummated until the victim died. That crime is not defined by the timing of the victim's death but, on its face, applies to any "knowing killing of another." The abolition of the year-and-a-day rule did not make that offense "greater" in any sense and did not increase the punishment that may be imposed upon conviction for second degree murder. After the decision below, second degree murder remains a "Class A" felony in Tennessee (Tenn. Code Ann. § 39-13-210(b) (1991 & 1997)), punishable by not less than 15 nor more than 60 years' imprisonment and a fine not to exceed $50,000. Tenn. Code Ann. § 40-35-111(b)(1) (1991 & 1997).

The only *Calder* category implicated by the abolition of the year-and-a-day rule, had it been accomplished by statute, is the fourth, for, as this Court has recognized (*see Louisville, E. & St. L. R. Co. v. Clarke, supra*), and as the opinion below plainly indicates (J.A. 17-21), the rule operated at common law as a principle of evidence whose purpose was to foreclose the possibility of proving causation in homicide cases if the victim died beyond a year

and one day after his initial injury. But the abolition of the rule does not allow a homicide conviction in Tennessee on "less, or different, testimony" than previously required. *Calder*, 3 U.S. (3 Dall.) at 390. First, the year-and-a-day rule did not specify a particular "quantum of evidence" necessary to establish causation. *Compare Carmell, supra* (Texas statute eliminating the need for corroboration of child sex abuse victim's testimony, required by prior law to support a conviction for the offense, is ex post facto under *Calder*'s fourth category as applied to offense committed before the change.) Its concern was temporal, not quantitative. Thus, in no sense is "less proof" of causation, "in amount or degree," now made legally sufficient to prove that element of homicide as a result of the elimination of the rule. *Hopt v. Utah*, 110 U.S. 574, 590 (1884). The State must still prove causation beyond a reasonable doubt.

Nor does the abolition of the rule mean that evidence of a "different" type may suffice to carry the State's burden. Now, as before, testimonial and/or physical evidence must establish, beyond a reasonable doubt, both that the defendant knowingly injured the victim and that the victim died as a result of that injury. The sole impact of the rule's abolition is to eliminate a wholly arbitrary and irrational restriction, based on nothing more than the timing of the victim's death, which was formerly imposed on the admissibility of otherwise reliable, competent proof of causation. Alterations in rules of evidence, which "simply enlarge the class of persons who may be competent to testify," but which "leav[e] untouched the nature of the crime and the amount or degree of proof essential to conviction," do not violate the Ex Post Facto Clause as

applied to prosecutions for crimes committed before the change. *Hopt*, 110 U.S. at 589-90. That is precisely the situation presented here. The abolition of the year-and-a-day rule "simply allows the State the opportunity to attempt to prove causation" (J.A. 21); it does not authorize conviction on any less proof.

CONCLUSION

The judgment of the Supreme Court of Tennessee should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

WILBERT K. ROGERS,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Tennessee

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ARGUMENT

1. The year-and-a-day rule is a substantive rule of law.

In the Tennessee Court of Criminal Appeals, the State argued the year-and-a-day rule was a substantive rule of law.[1] In the Tennessee Supreme Court, the State conceded the rule was a substantive principle of state law.[2] For the first time, in its brief in this Court, the State takes the position the rule "was not an *element* of homicide, but was merely an exclusionary rule of evidence relating to causation."(emphasis added) (p. 21). In couching its argument in this fashion, the State demonstrates either a misunderstanding of the nature of substantive criminal law, or an attempt to shift the Court's focus away from the issue of whether the rule was substantive.

A. The State's Brief is based on a misunderstanding of the nature of substantive criminal law.

The State's Brief did not specifically respond to the contention that the rule was substantive in nature, yet such an argument can be implied from its claim that the rule is "merely an exclusionary rule of evidence." The State erroneously concludes that "substantive" criminal law refers only to the statutory elements of an offense.

Substantive criminal law consists of (1) definitions of specific crimes, (2) broader general principles applicable to more than a single crime *and so not made a part of the*

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[1] The State argued that the rule constituted a legal defense.

[2] *See State v. Rogers*, 992 S.W.2d 393, 399 (Tenn. 1999) (J.A. 26).

definitions of specific crimes, and (3) some even broader propositions of law, the basic premises which underlie the whole of the substantive criminal law. See WAYNE R. LAFAVE, CRIMINAL LAW § 1.2(a) & (b), pp. 7-8; § 3.1, pp. 204-206 (West 2000).[3]

As LAFAVE explains, traditionally, the first type includes the actus reus, mens rea and, in some offenses, attendant circumstances and a specified result. The second type includes "defenses," while the third type encompasses such general principles as the requirements of "causation," "concurrence" and the "year-and-a-day"

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[3] J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 17 (2d ed. 1960), refers to these three types as "rules," "doctrines," and "principles." As an example, LAFAVE explains that substantive criminal law:

> is concerned with much more than is found in the definitions of specific crimes, for there are many general principles of the substantive criminal law which apply to more than a single crime – for instance, the principle that an insane person cannot be guilty of any crime, or that one coerced into committing what would otherwise be criminal conduct cannot be guilty of most crimes. Thus criminal battery is sometimes defined as 'the intentional or reckless application of force to the person of another, directly or indirectly.' The definition does not continue: ' . . . by one who is not legally insane; not legally too young; not too intoxicated to have the necessary state of mind; who was not coerced . . . ; and who was not justified because he acted in self-defense, or pursuant to domestic authority, or because the other person consented,' and so on. See LAFAVE, *supra*, at pp. 7-8.

rule.[4] Thus, the State's conclusion that the rule cannot be substantive where it was not included in the statutory elements of the offense is wrong.

B. The State's detailed recitation of the origins and development of the common law rule support the Petitioner's assertion that the rule was substantive in nature.

The State summarizes the origin and general development of the common law year-and-a-day rule. Most of this recitation further supports Petitioner's argument that the rule was substantive law. For example, the State acknowledges that Lord Coke included the rule in the definition of murder (pp. 16-17), and cites Donald E. Walther, *Taming A Phoenix: The Year-And-A-Day Rule in Federal Prosecutions for Murder*, 59 U. CHI. L. REV. 1337, 1338 (1992), for the proposition that at some point in its history the rule made a transition from a statute of limitations to "a principle of law in homicide cases" (p. 15).[5]

The State mistakenly seeks support for its contention that the rule was merely evidentiary in two opinions of this Court – *Ball v. United States*, 140 U.S. 118 (1891), and *Louisville, E. & St.L.R. Co. v. Clarke*, 152 U.S. 230, 241

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[4] The year-and-a-day rule could be considered a limitation on the actus reus of "killing," a necessary "attendant circumstance," or a general principle of law applicable to all homicides. However characterized, it is substantive in nature.

[5] Walther actually says on the page cited by the State that the rule evolved from a statute of limitations to a *substantive* principle of law. *Id.* at 1338.

(1894). In fact, the *Ball* Court reversed murder convictions, finding the underlying indictment fatally defective for failing to allege that the victim's death occurred within a year-and-a-day. As noted in *Ball*, "The controlling *element* which distinguished the guilt of the assailant from a common assault was the death within a year and a day." *Supra* at 133 (emphasis added). That language clearly suggests that the rule was considered substantive. Three years later, the *Clarke* Court addressed the rule again, acknowledging the general applicability of the rule in criminal cases, but holding it did not apply in civil cases. In discussing the rule, the Court said: "if a person alleged to be murdered die after that time, it cannot be discerned, as the law *presumes*, whether he died of stroke or poison, etc., or a natural death; and, in case of life, a rule of law ought to be certain."[6] (emphasis added). The Court's choice of the word "presumes" further implies that the rule was substantive. Although it is stated in *Clarke* that "[i]n prosecutions for murder the rule was one simply of criminal evidence," *supra* at 241, it has been suggested that this conclusion was dicta, as the issue before the Court was not the nature of the rule and did not involve its interpretation in a criminal context. *See United States v. Chase*, 18 F.3d 1166, 1172 (4th Cir. 1994). *See also*, Walther, *supra* at 1341, which suggests that both characterizations of the rule may be accurate in that it could be considered a "conclusive presumption that displays both substantive (*Ball*) and evidentiary (*Clarke*) facets."

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[6] Citing 3 Coke, Institutes at 53.

One of the most recent and detailed considerations of the rule is contained in *United States v. Chase, supra*. The *Chase* Court recognized that a conclusive or irrebuttable presumption must be considered a substantive rule of law, *id.* at 1172, n.7, and said: "Our review of both ancient and modern commentators and state court opinions discussing the rule convinces us that the year and a day rule is a substantive rule of law." *Id.* at 1173.

Finally, although the State catalogues various ways in which the rule has been "characterized" by different courts (pp. 18-19), the State's own characterization of the rule as an "exclusionary rule of evidence" is notably absent from this list. Further, it is neither the "label," nor the "characterization" put on a rule which determines if it violates ex post facto principles. *Collins v. Youngblood*, 497 U.S. 37, 46 (1990) ("simply labeling a law 'procedural,' . . . does not thereby immunize it from scrutiny under the Ex Post Facto Clause. Subtle ex post facto violations are no more permissible than overt ones."). Characterizing the rule as evidentiary will not insulate the State of Tennessee from Constitutional mandates. Whatever the label, the true test remains whether it made "changes in the substantive law of crimes." *Collins* at 45.[7]

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[7] The *Collins* Court stated that a law abolishing an affirmative defense would violate ex post facto concerns. *Id.* at 43.

C. The nature of the year-and-a-day rule as described by the Tennessee Courts is such as to render it a substantive principle of criminal law.

There is no question that on the day James Bowdery was stabbed, the rule was in full force and effect in Tennessee. *See Percer v. State*, 103 S.W. 780 (Tenn. 1907); *Cole v. State*, 512 S.W.2d 598 (Tenn. Crim. App. 1974); *State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999) (J.A. 11-29); *State v. Ruane*, 912 S.W.2d 766 (Tenn. Crim. App. 1995) (describing the rule). However, the State insists none of these cases "affirmatively discloses the nature of the Tennessee rule,"(p. 21), except for *Rogers*, which it claims demonstrates that the rule is "evidentiary in nature." (p. 24). In fact, the aforementioned cases explicitly demonstrate that the Tennessee rule is substantive.

In *Percer*, *supra* at 782, the Tennessee Supreme Court, quoted approvingly *Wharton On Homicide* (3d ed.), p. 18, which said of the rule: "In murder, the death must be proven to have taken place within a year and a day from the date of the injury received." In *Rogers*, *supra* at 396, (J.A. 15), it cited this same quote for the proposition that it had recognized "the viability of the rule in Tennessee" since 1907. In *Cole*, *supra* at 601, the Tennessee Court of Criminal Appeals said of the rule: "The common law provides that death must ensue within a year and a day from the infliction of the mortal wound to constitute punishable homicide."[8] In *State v. Ruane*, *supra* at 774, the

[8] This quote from the Tennessee Court of Criminal Appeals was quoted with approval by the Tennessee Supreme Court in *Rogers*. (J.A. 15-16).

same Court said "[a]t common law, the proof must have established that the victim died within a year and a day from the date of the injury received." Thus, the Tennessee courts have consistently interpreted the common law year-and-a-day rule as an essential element of the proof which the prosecution was required to prove.

In addition to their general comments regarding the rule, the Tennessee Supreme Court, in rejecting the argument that the rule was nothing more than a defense, said: "While similar in some respects to a defense in a sense that it precludes conviction, the year-and-a-day rule *is even more powerful than a defense because it entirely precludes a murder prosecution.*" *Rogers*, *supra* at 400. (J.A. 23) (emphasis added). It is hardly plausible that the Court would recognize the rule is "more powerful" than a substantive rule of law, yet conceive of it as merely a rule of evidence. In addition, the quote indicates that the rule was considered a conclusive presumption, thus constituting a substantive rule of law.[9]

Further, in *Rogers* the Tennessee Supreme Court did not specifically adopt the characterization of the rule urged by the State. Nor did it characterize the rule as "merely an exclusionary rule of evidence,"(State's Brief p. 21), or specifically refer to the rule as merely being "evidentiary in nature." (State's Brief p. 24). Had the Tennessee Supreme Court deemed the rule nothing more than a rule of evidence without substantive implications, it

[9] In *Rogers*, the Tennessee Supreme Court, in discussing the history of the rule, utilized cases which referred to the rule as a conclusive presumption ("conclusively presumed") and an "irrebuttable presumption." (J.A. 18-19).

could have specifically said so. Further, there would have been no need for the Court to analyze the case under the *Bouie* doctrine and conclude that its "decision abrogating the rule is not an unexpected and unforseen judicial construction of a *principle of criminal law.*" *Rogers, supra,* at 402. (J.A. 28) (emphasis added).

2. General ex post facto principles prohibit the retroactive abolition of the year-and-a-day rule if accomplished by an act of the Tennessee legislature.

Rather than address Petitioner's contention that the Legislature could not retroactively abolish the rule, the State recast the argument, claiming that the retroactive judicial abolition violated none of the four *Calder* categories. (State's Brief pp. 42-46).

According to the State, the first *Calder* category is not violated because the "statutory offense" does not include the rule. This stance ignores the fact that the Tennessee Supreme Court has, since 1907, interpreted state homicide statutes to include the rule despite the fact that no statute has ever explicitly included it. If the legislature had passed a law in 1999 abolishing the rule, it would have affected a substantive change in the law. Likewise, judicial abrogation of the rule changed the substantive law.

The State's contention that the second and third *Calder* categories were not violated also relies on the failure to include the rule in the explicit language of the statutory offense. The State reasons there can be no ex post facto violation since the abolition of the rule did not

change the specific wording of the statutory offense. As explained earlier, this argument relies upon a fallacious understanding of the nature of substantive criminal law. At the time of the victim's death the law then in effect forbade Petitioner's conviction for murder. A retroactive change in the substantive law which permits such a conviction, whether by legislative action or judicial decree, violates both the second and third *Calder* categories.

Finally, the State contends the fourth *Calder* category was not violated because the retroactive abolishment of the rule was a type of procedural or evidentiary change not contemplated by ex post facto principles. It argues that changes which "leav[e] untouched the nature of the crime and the amount or degree of proof essential to conviction," do not implicate ex post facto concerns. (State's Brief pp. 45-46). Again, the State's proposition is grounded on its failure to recognize that substantive criminal law includes matters beyond the statutory definition of an offense.

The year-and-a-day rule was substantive criminal law which created an absolute bar to prosecution and conviction. Prior to its abolishment, the State was required to prove both (1) causation and (2) death within a year and a day. Failure to prove either of these substantive principles resulted in an acquittal. The consequence of the rule's abrogation was to lessen the State's total burden of proof. The burden of proof as to "causation" was unchanged, while the burden of proof to convict was lessened by eliminating the separate requirement to prove death within a year and a day. Simply put, the two principles of substantive criminal law, causation and the year-and-a-day rule, are separate requirements of the law

which cannot be subsumed within each other.[10] Retroactive abolishment of the rule clearly violated the fourth *Calder* category.

3. The purposes behind the prohibition on ex post facto laws are so fundamental that Due Process prevents the Tennessee Supreme Court from obtaining the same result by judicial decree.

In response to Petitioner's claim that the Fourteenth Amendment bars retroactive application of judicial rulings in criminal cases that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," *Bouie v. City of Columbia*, 378 U.S. 347, 353-354 (1964), the State contends that (a) *Bouie* and its progeny should be interpreted only to prevent retroactive judicial decisions which violate the Due Process right to fair warning *that conduct is criminal* and (b) general ex post facto principles should have no application to judicial decisions through the Due Process Clause.

The State first contends that reference to the Ex Post Facto Clause in *Bouie* and its progeny is *dicta*, and *Bouie* should only prevent application of judicial decisions which violate the principle of fair warning *as to what conduct is criminal*. However, the State further contends:

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[10] The reason for the common law rule was not limited to difficulty in proving causation. (See J.A. 16-17).

> "Read in context, *Bouie*'s references to ex post facto principles thus reflect no more than a recognition that both constitutional provisions – the Ex Post Facto Clause and the Due Process Clause – share a common concern: the unfairness of criminalizing conduct, *or of escalating its penal consequences, after the fact*. (State's Brief p. 37) (emphasis added).

Thus, the State actually concedes that the Due Process Clause is concerned with more than simply fair warning that certain conduct is criminal, but also addresses the unfairness of escalating the penal consequences of a criminal act.[11] Petitioner contends that this is exactly what has occurred. The Tennessee Supreme Court has by retroactive judicial decree altered the substantive criminal law in such a way that the penal consequences of Petitioner's offense have been aggravated.

The State also asserts that application of ex post facto principles through the Due Process Clause would violate 200 years of precedent which holds that the Ex Post Facto Clause does not apply to the judiciary. See, e.g. *Frank v. Mangum*, 237 U.S. 309 (1915). Petitioner fully recognizes

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[11] "The presumption against retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption 'is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. This doctrine finds expression in several provisions of our Constitution. The specific prohibition on ex post facto laws *is only one aspect of the broader constitutional protection against arbitrary changes in the law.*" *Lynce v. Mathis*, 519 U.S. 433, 439-440. (internal citations omitted) (emphasis added). The Court goes on to say that the Due Process Clause also protects against the retroactive application of new laws.

the continuing viability of the general rule that the Ex Post Facto Clause does not limit judicial action. This Court fully recognized this general rule in *Marks v. United States*, 430 U.S. 188, 191-192 (1977), but went on to hold that *under limited circumstances* due process prevents courts from obtaining the same prohibited result by judicial decree because the principles on which the Ex Post Facto Clause is based are so fundamental to the concept of constitutional liberty. Petitioner has not argued for the *unlimited* incorporation of the Ex Post Facto Clause via the Fourteenth Amendment. *Bouie*, its progeny, and Petitioner's argument all place a significant limitation on the application of ex post facto principles to judicial rulings. Due Process only prevents retroactive judicial rulings which are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." This limitation takes into account the fundamental differences between legislative and judicial law-making.[12] Because of these differences, courts may more freely apply their rulings retroactively than legislatures may

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[12] *Bouie, supra* at 354, adopts the limitation urged by Jerome Hall found at HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960), at 61. Hall considers the fact that under traditional theory all case law operates retroactively and that such a principle is an essential part of any legal system. "The important thing, therefore, is not the invalidity of the literal interpretation of the traditional theory in this regard but the actual quality of the adjudication. Specifically, is a decision retroactive only in the above unavoidable way or is it also unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue? . . . In any event, the inevitability of a slight 'normal' degree of retroactivity in judicial decision provides no ground for tolerating it in its obvious manifestations." HALL at 61.

retroactively apply legislation. So long as a judicial ruling is not "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue" it may be applied retroactively without offending due process.

The State also asserts that such an interpretation of Due Process would "open up a boundless new frontier of litigation in criminal cases" and would transform a vast array of state law matters into federal issues. (pp. 40-41). In fact, the lower courts have already interpreted *Bouie* as applying ex post facto principles via the Due Process Clause to judicial rulings that are "unexpected and indefensible." See Harold J. Krent, *Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WMS. U. L. REV. 35, 55-56 (1997) ("Lower courts have extended the Supreme Court's due process analysis to unforeseeable judicial changes in sentencing structure as well, making the reach of the Due Process and Ex Post Facto Clauses congruent."). Despite these applications, the courts have not been inundated with *Bouie* claims and very few such claims have been successful. Krent, *supra* at p. 58.

The State further contends that forcing courts to apply their rulings retroactively will discourage departures from prior precedent and serve as a check on judicial lawmaking. It relies upon Justice Scalia's concurring opinion in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991), and Krent, *supra* at p. 82, as support. This reliance ignores Krent's commentary:

> That justification for full retroactivity, however, misses the point in the criminal law context. Little reason exists to think that judges will be

> reluctant to fashion new common law doctrines or interpretations of statutory language affecting the rights of criminal offenders due to the requirement of applying all new rulings to similarly situated offenders. Indeed the opposite is true. Judges may be tempted to change interpretations precisely in order to achieve a retroactive effect and punish particular offenders more harshly. Krent, at p. 83.

The State further argues Petitioner has offered no persuasive reason why ex post facto principles should be applied to judicial decrees via the Due Process Clause. However, Petitioner's opening brief argued that the principles on which the Ex Post Facto Clause is based, i.e fundamental justice, fair warning, and the prevention of arbitrary and vindictive changes of laws, are core concepts of constitutional liberty, and that the Due Process Clause prevents courts from applying judicial rulings in ways which impinge upon these principles. Each of these principles are implicated in the present case. In response to Petitioner's argument, the State attempts to argue that Due Process is only concerned with fair notice *that an act is criminal*. They offer no response to the "fundamental fairness" contentions and all but ignore the fact that "fair warning" has been interpreted to include more than the notion of fair warning that conduct is criminal.[13]

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[13] In addition, the concept of "fair warning" is not just limited to the time of the act. A criminal defendant is also entitled to fair warning of the law and applicable punishment subsequent to the act. See e.g. *Lynce v. Mathis*, 519 U.S. 433, 440 (1997) (Ex post facto laws protect "the indigent defendant engaged in negotiations that may lead to an acknowledgment of guilt and a suitable punishment.")

Petitioner also raised the possibility that elected state judges may be susceptible to the same kind of influences which justify ex post facto limitations on legislatures. The State's response was simply that no authority had been cited for this contention. Yet its Brief relied heavily upon Krent, who concurs that: "On balance, therefore, state court judges, because of their interest in reelection, are more prone to the same kind of influences that arguably justify stringent judicial review of legislative retroactivity under the Ex Post Facto Clause." Krent, *supra* at 91-92.[14]

Finally, Petitioner contends that his argument for a *limited* application of ex post facto principles to judicial law-making via the Due Process Clause is more reasonable than the State's desire that courts have *unlimited and unbridled* power to retroactively alter substantive criminal law and aggravate an offense to the detriment of a citizen.

Remarkably, the State contends that "it is impossible to pinpoint exactly when the year-and-a-day rule ceased to operate in Tennessee." (p. 31). With such unlimited discretion to alter substantive law and no statute of limitations on murder, a defendant who committed an assault in 1970 could now be prosecuted for murder if the State could establish causation.[15] Further, the State's

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[14] The commentator cites the fact that one Tennessee Supreme Court Justice lost an election in 1996 because of her participation in an opinion favorable to a criminal accused. Krent, *supra* at p. 91, n. 232. See Amicus pp. 12-13.

[15] Tennessee prosecutors are already exhuming bodies of individuals who died more than a year after being assaulted and who died before *Rogers* abrogated the year-and-a-day rule.

logic, if carried to extremes, would permit the Tennessee Supreme Court to eliminate the common law requirement of causation and apply that change retroactively, as well. The need for repose suggests that retroactive alterations of substantive law require some limitations.

CONCLUSION

If this Court finds a violation of Due Process, Petitioner will still be subject to punishment for his criminal acts. This is not a situation where the Petitioner will escape justice. All he asks is that he face the law as it was at the time of his offense.

The opinion and judgment of the Supreme Court of Tennessee should be reversed. Retroactive application of the judicial abolishment of the year-and-a-day rule to Petitioner violates the Fourteenth Amendment of the United States Constitution. Accordingly, this case should be remanded to the Supreme Court of Tennessee for a determination as to whether Petitioner's sentence may be

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See The Commercial Appeal, March 27, 1999, Section B3, reported at 1999 WL 4142499.

modified to a lesser offense or whether a new trial is required.

Respectfully submitted,

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In The

Supreme Court of the United States

WILBERT K. ROGERS,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Tennessee

BRIEF OF AMICUS CURIAE, TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS, IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the retroactive application of a judicial abolishment of the substantive rule of criminal law known as the "year-and-a-day rule" to an assault committed five years prior to that abolishment violates the Fourteenth Amendment of the United States Constitution?

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BRIEF OF AMICUS CURIAE, TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

STATEMENT OF THE INTERESTS OF AMICUS CURIAE

The Tennessee Association of Criminal Defense Lawyers (TACDL) files this amicus curiae brief pursuant to Supreme Court Rule 37.3(a), in support of the Petitioner, Wilbert Rogers. Consent was granted by W. Mark Ward, counsel for the Petitioner, and Michael E. Moore, Solicitor General for the State of Tennessee. The required letters of consent are filed with this brief.

The Tennessee Association of Criminal Defense Lawyers was incorporated in 1973 as a nonprofit organization and currently has seven hundred and twenty members. Its purpose is to provide education, training and support to lawyers who represent citizens of the State of Tennessee accused of crimes. The Association advocates a fair and effective criminal justice system in the courts, the legislature and wherever justice demands. One of the stated purposes of the organization is to protect and insure, by rule of law, those individual rights guaranteed by the constitutions of the United States and the State of Tennessee.

The question presented by this appeal is one which affects all citizens of the State of Tennessee, not just the named petitioner. The Tennessee Supreme Court's action in this case constitutes a marked departure from any prior, established practice. Its retroactive application denied the citizens of this State fair notice of the state of

the law, thus jeopardizing their rights to the fundamental fairness and due process guaranteed by the Fourteenth Amendment. The Tennessee Association of Criminal Defense Lawyers is concerned that this decision could significantly alter the ability of the criminally accused of this state to rely on the substantive laws in effect at the time of the commission of a crime, and concerned that a failure to expand the holding of *Bouie* to actions of this nature will result in further erosion of those important constitutional rights. For this reason, TACDL respectfully files this brief, in support of Mr. Rogers' arguments.

STATEMENT OF THE CASE

On May 7, 1994, the petitioner, Wilbert K. Rogers, assaulted the victim, stabbing him with a butcher knife. He was indicted on August 9, 1994, and charged with attempted first degree murder. The victim lingered in a coma for approximately sixteen months until his death in August of 1995. On September 12, 1995, a new indictment was returned by the Grand Jury of Shelby County, Tennessee, charging him with first degree murder.

Following a jury trial, Mr. Rogers was convicted of the lesser included offense of second degree murder and received a sentence of thirty-three years. On appeal to the Tennessee Court of Criminal Appeals, the petitioner argued the conviction could not stand because of the common law year-and-a-day rule, which provided that a citizen could not be charged with murder if death occurred more than a year and a day after the initial assault. *State v. Rogers*, 1997 WL 642309 (Tenn. Crim. App.

1997). The intermediate appellate court denied relief, holding that the year-and-a-day rule had been abolished by the Tennessee State Legislature in 1989, when it recodified the criminal code. The Court of Criminal Appeals reasoned that the year-and-a-day rule was a common law defense, and the failure of the Legislature to list it as an affirmative defense in the new code resulted in its abolition.

On appeal to the Tennessee Supreme Court, the verdict and sentence were upheld, but on different grounds. *State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999). The Tennessee Supreme Court ruled that the year-and-a-day rule was not a common law defense, and was not abolished by the Legislature in 1989. The state conceded that it was a substantive element of the crime of murder. The Supreme Court found no justification for continuing to require the application of the year-and-a-day rule in the face of advances in modern medicine, however, and judicially abolished the rule.

The subject of this appeal, however, and the concern of amicus curiae, is not the abolition of the year-and-a-day rule by the Tennessee Supreme Court, but its retroactive application of the abolition to a crime which occurred almost five years to the day before the Supreme Court's pronouncement of its removal from the laws of the State of Tennessee.

SUMMARY OF THE ARGUMENT

The Fourteenth Amendment's guarantee of due process of law was violated by the retroactive application of

the Tennessee Supreme Court's abolition of the common law "year-and-a-day rule" in this case. This Court ruled, in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), that courts should not be permitted to do by judicial action, what legislatures are forbidden to do by ex post facto considerations. Although *Bouie* dealt with the judicial interpretation of a statute, the same considerations should apply when a court judicially abolishes a common law doctrine favorable to a defendant and applies it retroactively to convict him of a much greater crime than that for which he could otherwise be punished.

In Mr. Rogers' case, the Tennessee Supreme Court did not properly apply *Bouie* in making the decision on retroactive application. They cited the law of other states as their primary support for a finding that their action was not "unforeseeable" to the citizens of Tennessee, a practice specifically criticized in *Bouie*. *Id.* at 359. They gave little effect to the fact that the doctrine was well established in Tennessee, and had not been overturned, either by judicial or legislative action. Instead, they pointed to a failure of the appellate courts to cite frequently to the cases which recognized the doctrine, and language in a lower court decision, issued more than a year after the initial attack on this victim, which indicated a 1989 criminal code revision may have abolished it as a common law defense. *Rogers*, 992 S.W.2d at 402.

The abolition of the year-and-a-day rule was unforeseeable and constituted a substantial departure from the prior status of the common law in effect at the time of the commission of the crime in this case. Despite the Supreme Court's statement that the retroactivity of

their action "does not allow the State to obtain a conviction upon less proof, nor does its abolition impose criminal sanctions for conduct that was heretofore innocent," *Rogers* at 402, there is no analysis of those contentions, and nothing in the record to support such a finding. In fact, the action of the Court in Mr. Rogers' case would have violated all of the prohibitions against ex post facto laws if done by a legislative body. *Calder v. Bull*, 3 Dall. 386 (1798), *Rogers* at 402, citing *State v. Pearson*, 858 S.W.2d 879, 881 (Tenn. 1993); *Miller v. State*, 584 S.W.2d 758, 761 (Tenn. 1979) (adopting the categories identified in *Calder* and stating that "every law which, in relation to the offense or its consequences, alters the situation of a person to his disadvantage" constitutes an ex post facto law).

Of great concern to amicus curiae is the fact that the Supreme Court justified its action by reliance on cases involving civil common law, which tenets do not take into consideration the rights of the criminally accused, or the requirements of due process of law in a criminal setting. The opinion also appears to require the citizens of Tennessee to become learned in the law of all the states of this nation in order to "foresee" whether or not the criminal laws of this state might be changed, without prior notice from its own courts or state legislature. Finally, the implications of permitting the highest Court of the State to single out individual citizens for retroactive treatment, another action not legislatively permitted under the ex post facto laws, should be given great consideration by this Court, and the conviction for murder should be reversed.

ARGUMENT

The Tennessee Supreme Court reversed a hundred years of common law precedent in this case, and gave it retroactive application so as to deprive Wilbert Rogers of his right to rely on a principle of law which existed at the time his crime was committed. It did so by judicially abolishing the well established common law requirement that a death occur within a year and a day of the initial assault to constitute a murder. The action of the Supreme Court was not based on any valid precedent, thus its application to Mr. Rogers violated the Fourteenth Amendment's due process requirements of fair warning and fundamental fairness and constituted an unforeseeable change in the law which should not have been applied retroactively. *Bouie v. City of Columbia*, 378 U.S. 347 (1964). This case also requires an extension of the principles regarding the retroactive application of judicial decision-making set forth in *Bouie* to other circumstances in which the ex post facto laws would bar the same action by a legislative body.

1. The Fourteenth Amendment's guarantee of due process of law was violated by the retroactive application of the Tennessee Supreme Court's abolition of common law "year-and-a-day rule."

The Tennessee Supreme Court noted in its opinion that the year-and-a-day rule was an ancient concept dating back to at least the thirteenth century. It was recognized by the United States Supreme Court as early as 1894, *Louisville, Evansville & St. Louis R.R. Co. v. Clarke*, 152 U.S. 230 (1894), and cited in Tennessee case law as an

established principle of common law in 1907. *Percer v. State*, 103 S.W. 780 (Tenn. 1907). The Court found the rule was not an affirmative defense to a charge of murder, but "even more powerful than a defense because it entirely precludes a murder prosecution." *State v. Rogers*, 992 S.W.2d 393, 400 (Tenn. 1999). The Court also agreed with petitioner that this important element had not been abolished by a sweeping revision of the criminal codes by the Tennessee Legislature in 1989. *Id.* at 400.

The Court found, instead, that this common law principal had outlived its usefulness and "advances in medical science, improved trial procedure, and sentencing reform have eroded the reasons originally supporting the common law year-and-a-day rule." *Id.* at 401. Based primarily on case law from other states which had previously abandoned the rule, the Court declared its intention to abolish it in Tennessee, as well. The Court then found there would be no due process violation in applying the abolition of the law retroactively to Mr. Rogers' case because their action was not unforeseeable. Their decision with regard to foreseeability was based on: 1) the abolition of the rule by other states, 2) language from a lower court opinion issued after the initial attack in this case, 3) the failure of the 1989 code revision to incorporate the doctrine into the new statutory scheme, and 4) an unsupported opinion that retroactive application would not violate certain of the ex post facto rules which apply to legislative actions. *Id.* at 402.

The Court's opinion is internally inconsistent, inconsistent with the laws of Tennessee and inconsistent with the law established by this Court in *Bouie*. Despite the Court's statement to the contrary, reliance on the factors

set forth above to support a retroactive application of the abolition of a common law doctrine are not supported by the legal precedent of this state. The Court noted it has "not hesitated to abolish obsolete common-law doctrines," and recognized "a special duty to do so where it is the Court, rather than the Legislature, which has recognized and nurtured the common law rule," citing to *Dupuis v. Hand*, 814 S.W.2d 340, 345 (Tenn. 1991) (abolishing the tort of alienation of affection). *Dupuis*, in turn cites to *Hanover v. Ruch*, 809 S.W.2d 893 (Tenn. 1991) (abolishing the tort of criminal conversation); *Kilbourne v. Hanzelick*, 648 S.W.2d 932, 934 (Tenn. 1983) (abolishing discriminatory rule denying liability of wife for support of husband); *Davis v. Davis*, 657 S.W.2d 753, 758 (Tenn. 1983) (abolishing interspousal tort immunity doctrine); and *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 398 S.W.2d 240 (1966) (abolishing privity requirement in strict tort). *Rogers* at 400.

The cases cited above are all civil cases, however, in which tenets of the civil common law were abolished. It has long been recognized that civil matters are not subject to the strictures of the ex post facto laws. *Calder v. Bull*, 3 Dall. 386 (1798). The cases cited by the Court did not rely on ex post facto principles, or the concept of due process, but rather on the provision against "retrospective laws" found in Art. I, Sec. 20 of the Tennessee Constitution. The standard for retroactive application in such cases is clearly different from those which apply to criminal cases and should not be cited as support for these actions. *Hanover, supra* at 896. In fact, the Tennessee Supreme Court does not appear to have ever acted to abolish a tenet of common law doctrine in the criminal context,

thus it cannot be said that this action was foreseeable to the citizens of Tennessee.

Other reasons given by the Court to support retroactive application also fall short of proving that a change in the law was foreseeable to the average citizen of Tennessee. The Court speculated that the infrequency with which the year-and-a-day rule had been cited by the appellate courts supported a finding that it was obsolete and little used in the state. *Rogers* at 396. In fact, it is more indicative of the fact that cases in which the victim did not die within a year-and-a-day were not charged as murder cases, but rather as lesser charges, as the doctrine requires. Nor should an intermediate appellate court opinion issued in 1995 be considered adequate notice to Mr. Rogers that the year-and-a-day rule was subject to change. This opinion was issued more than a year after the initial attack occurred. *State v. Ruane*, 912 S.W.2d 766, 774 (Tenn. Crim. App. 1995). *Ruane* merely noted that the "defense" of the year-and-a-day rule may have been abrogated by the 1989 revisions to the Tennessee criminal code. The accuracy of this finding was subsequently disavowed by the Supreme Court in Mr. Rogers' own case, where it was noted the doctrine was not a defense, and could not have been abolished by the code revisions in any case. *Rogers* at 400. It is unfair for the Court to say the faulty rationale of the lower court, issued long after the commission of the crime, put this petitioner on notice of a pending change in a century old tenet of the common law. Likewise, the Court's allegation that the failure of the 1989 code revision to mention the doctrine lacks persuasion. The year-and-a-day rule was never codified,

and again according to the *Rogers* opinion, could not have been abolished by the Legislature. *Rogers* at 400.

Although "emphasizing" that "abolition of the rule does not allow the State to obtain a conviction upon less proof, nor does its abolition impose criminal sanctions for conduct that was heretofore innocent," *Rogers* at 402, the Court provided no analysis for those contentions, and nothing in the record supports such findings. In actuality, the Court removed the State's burden of proving a previously required element of the offense, clearly a lesser evidentiary standard for the State. *Carmell v. Texas*, ___ U.S. ___, 120 S.Ct. 1620, 1627 (2000). It also increased the crime for which Mr. Rogers was accountable from attempted murder to first degree murder. Thus, although it may not have imposed a criminal sanction on previously "innocent" behavior, it certainly violated two other standards established in *Calder* by creating "a law which aggravates a crime or makes it greater than when it was committed" or "a law that changes punishment or inflicts a greater punishment than the law annexed to the crime when it was committed." These are clearly actions which the Tennessee Legislature would not be permitted to enact under either the state or federal ex post facto rules, and there is absolutely no rationale for permitting an identical encroachment on the due process rights of the citizen accused in Tennessee under the auspices of retroactive judicial action.

The Tennessee Supreme Court overruled a consistent line of procedural decisions and a long established tenet of common law, and gave it retroactive effect, depriving Mr. Rogers of due process of law "in its primary sense of

an opportunity to be heard and to defend (his) substantive right." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930). This unforeseeable state court construction of a criminal statute, applied retroactively, deprived the petitioner of fair warning that his contemplated conduct would constitute a greater crime than it would have in the past. *Bouie* at 1703. If the actions of this state's highest court are permitted to stand in this case, further arbitrary, retroactive applications of this nature can be expected, and neither defendants, nor counsel, will be able to predict in advance what actions might be punished, or what the punishment for one's actions might be.

2. This case requires an extension of the principles regarding the retroactive application of judicial decision-making set forth in *Bouie v. Columbia* to other circumstances in which the ex post facto laws would bar the same action by a legislative body.

The *Bouie* decision applied the rationale of the ex post facto laws, generally recognized as being applicable only to actions of a legislature, *Frank v. Magnum*, 237 U.S. 309 (1915), to the retroactive application of a court's statutory interpretation. The same evils which arise when a legislative body changes the laws after the commission of a crime, exposing a defendant to greater punishment, or to the criminalization of actions which were not criminal at the time, were found offensive to the Due Process provision of the Fourteenth Amendment when accomplished by judicial action. *Bouie* involved the judicial interpretation of a narrowly written statute which enlarged the activities subject to criminal penalty beyond previous interpretations by the state courts. *Marks v.*

United States, 430 U.S. 188 (1977). The harm the Court sought to protect in *Bouie* was the failure of the state to provide fair warning to its citizens that the law would be applied in such a fashion before applying it retroactively.

Due process concerns also parallel other aspects of the ex post facto provisions. One important reason for these laws was to ensure legislative enactments would "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981); *Calder* at 388; *Miller v. Florida*, 482 U.S. 423, (1987). Another reason the Ex Post Facto Clauses were included in the Constitution was to assure that federal and state legislatures were restrained from enacting arbitrary or vindictive legislation and preventing legislative abuses. *Calder* at 389. The obvious reason for applying these checks on the legislatures was the political pressures faced by elected legislators who need to maintain favor with voters and supporters and might act against a disenfranchised, unpopular individual or group of individuals for political gain.

Unlike federal judges, the appellate judges of Tennessee, and many other states, are subject to popular elections for retention. In 1994, the Tennessee Legislature established the "Tennessee Plan" for the selection and retention of appellate judges. *Tenn. Code Ann.* § 17-4-114. Although nominees for the bench are selected by a bipartisan commission and appointed by the governor, incumbents must stand for reelection every eight years. In 1996, Justice Penny White was removed from the Tennessee Supreme Court through this process, in large part because of the public perception, widely publicized across the state, that she had ruled too advantageously

for an appellant charged with an especially heinous crime. Nor is this politicalization of the judiciary limited to the state of Tennessee. *See*, John Gibeaut, *"Taking Aim,"* ABA Journal, Vol. 82, Nov. 1996.

Amicus curiae does not contend that any of the justices on the Tennessee Court acted for political gain, or any other improper purpose in this, or any other case. Yet the fact that they must stand for popular election cannot be ignored, and the need to protect an individual's rights to a fair trial and due process of law, and guard against the undue influence of public opinion, must be given heightened consideration in view of these recent, public changes. Because of the requirement that Tennessee's judges stand for reelection, the rationale for applying the same standards required by the ex post facto cases to their retroactive decision-making is stronger than it might have been in the past. Differences which might have arguably existed between the application of a ban against retroactive law-making on the part of legislatures, and retroactive interpretation on the part of the judiciary, are no longer so distinct as to require separate standards of application.

Likewise, the fact that the action taken by the Supreme Court in this case is more closely related to legislative action than to the normal interpretive functions of the Court should be given considerable weight in determining whether to hold the Court to the strict requirements of *Bouie*. The Court itself noted "a special duty to [abolish obsolete common-law doctrines] where it is the Court, rather than the Legislature, which has recognized and nurtured the common law rule." *Rogers* at 400.

Yet the Tennessee Legislature has indicated that the common law should be used to interpret the current provisions of the criminal code, making the state of the common law of continuing importance and application. *Tenn. Code Ann.* § 39-11-104. The nature of this action, in and of itself, therefore, adds support to the argument of amicus curiae that *Bouie* should be broadened to preserve due process of law in similar circumstances.

The Tennessee Association of Criminal Defense Lawyers respectfully requests that this Court extend the rationale of *Bouie* to protect the citizens of this, and every state, from arbitrary, retroactive applications of judicial decision-making which create a climate of uncertainty and the possibility of unfair or vindictive law-making from the bench. Because these safeguards were not applied in Mr. Rogers' case, his conviction must be set aside.

CONCLUSION

The opinion the Supreme Court of Tennessee in Wilbert Rogers' case should be reversed. The Court's action was a significant departure from the longstanding common law and case precedents in this state. As it cannot be characterized as an expected or anticipated development in the law, retroactive application of the judicial abolishment of the year-and-a-day rule to Petitioner violated the Fourteenth Amendment of the United States Constitution. This case should be remanded to the Supreme Court

of Tennessee for a determination as to whether Petitioner's sentence may be modified to a lesser offense or whether a new trial is required.

Respectfully submitted,

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